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No. 07-(1)___

In the

Supreme Court of the United States

TIMOTHY J. RIGAS AND JOHN J. RIGAS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1(A). In a criminal securities fraud case alleging that certain liabilities were improperly omitted from a company's balance sheet, and where a written rule of GAAP prescribes the circumstances under which those liabilities must be included on a company's balance sheet, must the government acquaint the jury with the written rule and establish that it has been violated.

(B). In a securities fraud case alleging that a company's liabilities were improperly omitted from its balance sheet, and where the correctness of the balance sheet depends on the answer to an accounting question outside the knowledge and experience of lay jurors, must the government call an expert accounting witness before it may submit that improper omission issue to a jury?

2. Where one bank fraud count is submitted to the jury under theory A, and the other on theories A *and* B, and where the court of appeals reverses and dismisses the conviction on the first count because the government's proof of materiality on theory A was insufficient for legal reasons; must the verdict on the second count be reversed and remanded for a new trial under *Yates v. United States*, 354 U.S. 298, 312 (1957) because of the risk that the jury relied on the invalid theory A for its verdict on that count?

PARTIES TO THE PROCEEDING

In addition to the parties in the caption, Michael Rigas and Michael Mulcahey were co-defendants in the district court proceedings below.

RULE 29.6 STATEMENT

Petitioners state that they have no parent companies and no publicly held company that owns 10% or more of its stock.

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Petitioners, Timothy J. Rigas and John J. Rigas, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 24, 2007.

OPINIONS BELOW

The opinion of the court of appeals is reported at 490 F.3d 208 (2d Cir. 2007), and appears in the Appendix hereto at pages 1a-63a, *infra*. The court of appeals' order denying rehearing appears in the Appendix at pages 73a-74a, *infra*. The district court's opinion denying petitioners' motions for acquittal and/or new trials is not reported and appears in the Appendix at pages 64a-72a, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutory provisions and rules are reproduced in the Appendix at 75a-78a, *infra*: 17 C.F.R. § 240.10b-5; 15 U.S.C. §§ 78ff(a), 78j(b); 18 U.S.C. §§ 371, 1344.

JURISDICTION

The court of appeals issued its judgment on May 24, 2007 (App., *infra*, 1a-63a) and denied rehearing on July 12, 2007. 73a-74a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

1. The indictment in this securities fraud case charged the petitioners with misrepresenting

the liabilities of Adelphia Communications Corporation ("Adelphia") on its publicly disclosed balance sheet for the year 2000 by omitting $1.6 billion of co-borrowed debt for which Adelphia was contingently liable. The question of when a public company should include a contingent liability on its balance sheet is comprehensively addressed by a written rule known as FAS-5, which is a part of GAAP. Under FAS-5, a company is required to include contingent debt on its balance sheet if it is "probable" it will have to pay such debt, and not otherwise. FAS-5 also prescribes the rule for when and how disclosure of contingent debt should be made when the contingent debt is not required to be shown as a liability. However, the government chose not to call an expert witness to acquaint the jury with the terms of FAS-5, and did not attempt to establish that its terms had been violated.

This case, thus, presents the question whether – in a criminal securities fraud case turning on an issue covered by a written rule of GAAP – the GAAP rule governs; and, if it does, whether the prosecution must acquaint the jury with the terms of the rule and establish that it was violated. This case also presents the closely related question whether – in an accounting fraud case that turns on accounting standards outside the knowledge of lay jurors – the prosecution must call an expert witness to explain the applicable accounting standards before it may submit that issue to the jury.

The court of appeals held that "GAAP rules do *not* govern" in a securities fraud case (*see* 26a; emphasis added), and that compliance with GAAP is

relevant "only as evidence" on an issue of good faith. *See* 22a. This holding conflicts with pronouncements of several courts that the SEC *requires* public companies to prepare their public financial statements in conformity with GAAP. *See infra* at 22-23. GAAP, thus, provides the substantive rule of decision: Adelphia's liabilities can be said to be *misrepresented* only if the contingent liabilities at issue should have been shown on Adelphia's balance sheet under FAS-5.

The court of appeals also held that the government was not required to call an expert accounting witness. *See* 21a-26a. In a *civil* securities fraud case that turns on accounting issues outside the knowledge of lay jurors, an expert witness must be called by the party bearing the burden of proof on that issue. *See infra* at 27-28. The trial judge in this case repeatedly expressed his view that the government should call an accounting expert. *See infra* at 15. The government declined to do so, and as a result the jury had no way to know whether Petitioners had accounted for the contingent debt properly or not. It is intolerable and entirely illogical for the rule in criminal cases – where jail time is the consequence – to be in conflict with the rule in civil cases, involving only money damages.

The indictment alleged lesser frauds that, if found by the jury to have been proven, could have supported a securities fraud conviction. However, there is no way to know whether the jury convicted on these lesser frauds. Consequently, should this Court agree that the co-borrowed debt fraud allegations were improperly tried, Petitioners submit

that the rule in *Yates v. United States*, 354 U.S. 298, 312 (1957) requires that the securities fraud related convictions be reversed.

2. The indictment contained two counts of bank fraud. The first count was submitted to the jury on a single fraud theory – theory "A." The second count was submitted to the jury on two fraud theories, theory A and another theory, theory "B." The court of appeals reversed on the first bank fraud count and dismissed on the ground that, when the legal rules on materiality are properly understood, the government's evidence on materiality was insufficient. *See infra* at 34-37. For some reason, the court of appeals affirmed the conviction on the second bank fraud count, even though one of the theories on which it was submitted to the jury was the theory that the court of appeals had held invalid in reversing Petitioners' convictions on the first bank fraud count.

Thus, this case also presents the question whether Petitioners are entitled to a new trial on the second bank fraud count under the rule in *Yates*.

STATEMENT OF THE CASE[1]

The central issues in this securities fraud case – a case much misdescribed in the public media as a

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[1] "A-__" refers to the appendix filed with the court of appeals. "Tr." refers to the trial transcript, which can be found at A-594 to A-3257.

case of "looting" Adelphia's assets[2] – involved the accounting for and disclosure of co-borrowed debt, as described below.

A. FACTUAL CONTEXT

Adelphia was a publicly traded cable television company managed and partly owned by members of the Rigas family. Petitioner John Rigas was Adelphia's CEO, and his son, petitioner Timothy Rigas ("Tim Rigas"), was Adelphia's CFO. The Rigas family also owned private companies, several of which operated cable television systems, known as Rigas Family Entities ("RFEs"). *See* 84a at ¶12.

1. The Co-Borrowing Agreements

Certain Adelphia subsidiaries and RFEs entered into "co-borrowing facilities" with a consortium of banks.[3] By the end of 2000, these facilities permitted the "co-borrowing group" entities to borrow up to $3.7 billion. A-3877.1. Under the co-borrowing agreements, any member of the co-borrowing group – whether an Adelphia subsidiary

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[2] The only offenses in the indictment that alleged that Petitioners defrauded Adelphia, i.e., by looting Adelphia's assets, were the wire fraud counts; and the jury acquitted all defendants on all wire fraud counts.

[3] These co-borrowing facilities were entirely lawful, as the government conceded at trial. Tr. 11.399. The first such facility was established in 1996 to enable Adelphia to benefit from the RFEs' borrowing capacity and for the express purpose of having the RFEs use a portion of the borrowings to purchase Adelphia stock. Tr. 7030-31 (Brown); 1279-80 (Coyle).

or an RFE – could borrow up to the full amount of the facility. *Id.* Regardless of which entity used the funds, each entity was jointly and severally liable for the entire debt. *Id.* Adelphia was thus contingently liable for the RFEs' share of the debt, if the RFEs were unable to pay it when due.

2. Legal Obligations of Co-Borrowers

The legal obligations in the case of co-borrowings are described in the Restatement (Third) of Suretyship and Guaranty (1996) ("Restatement"). The Restatement states that where co-borrowers are jointly and severally liable to repay a loan, the *bank* has the right to collect from either party when the loan is overdue. The *borrowing parties*, however, may have an understanding between themselves as to which one must repay the money. *See* Restatement § 1, cmt. p. (usually the party that has use of the borrowed funds). The borrower that has agreed to repay the loan is called the "principal obligor," and the other borrower is the "secondary obligor." *Id.*[4]

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[4] The Restatement provides at § 1, cmt p (italics added):

> **Principal obligor's duty to perform or bear the cost of performance.** When an obligee has rights against two obligors but is entitled to only one total recovery, the obligee can usually recover from either obligor and those obligors can subsequently reallocate the cost of performance between themselves in accordance with the rights and duties between them created by their relationship. The obligor who has the duty ultimately to bear the cost of performance is the principal obligor, and the other obligor is the secondary obligor. The allocation of that duty may be

The essential point of the Restatement is that co-borrowers usually reach legally binding understandings *inter se* that determine which one must repay the loan. In this case, consistent with the Restatement, the RFEs and the Adelphia subsidiaries decided among themselves which entity would receive the use of the borrowed funds, and which would therefore have the responsibility to repay the banks. Tr. 7032-33, 7067-68 (Brown). The prosecution ignored this proposition throughout the trial and appeal.

3. Accounting For the Co-Borrowed Debt

Adelphia's liability for the RFEs' share of the co-borrowing debt was *contingent*, as the government's witnesses conceded. Tr. 3776, 3790-92 (Bilotti) (describing RFE co-borrowings as a "contingent liability" which Adelphia would have to repay only if the RFEs did not).[5] The portion of the debt for which Adelphia was only *contingently* liable was not carried on the books of Adelphia as a liability. Thus, Adelphia carried on its consolidated books the portion of the co-borrowed debt on which its subsidiaries were the principal obligors, and the

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determined by agreement or by the relationship *between the obligors*. . . . Determining which obligor has the duty to bear the cost of performance, or whether the two each have a duty to bear part of the cost, may depend on *which obligor received the direct benefit of the consideration for the promise, or whether they shared that benefit*.

[5] *See also* Tr. 6474, 6844-45, 7071 (Brown); 8624, 8781 (DiBella).

RFEs carried on their books the portion on which *they* were the principal obligors. Tr. 7066-68 (Brown). This was done "in complete good faith" according to the government's own witness. Tr. 6844-45, 7070-73 (Brown). Deloitte knew of and approved this practice. Tr. 7070-72 (Brown); A-3442.[6]

4. Amount of Co-Borrowings

The RFEs' co-borrowed debt increased over time. They owed $425 million to the lending banks by year end 1999, and $1.6 billion by year end 2000. A-3442.[7] By the end of 2000, Adelphia's share of the co-borrowed debt was $2.5 billion. *Id.* Adelphia,

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[6] In the notes to its financial statements in its 10K for the year 2000, Adelphia disclosed: 1) the existence of the co-borrowing facilities, 2) the fact that either the RFEs or Adelphia could borrow up to the full amount available under those facilities, 3) the fact that these borrowings could be up to $3.7 billion (as of the end of 2000), and 4) the fact that Adelphia was jointly and severally liable for all borrowings. A-3877.1; *see also* A-3849.2 (analogous disclosure in 10K for 1999). The amount of the RFEs co-borrowings as of December 31, 2000 was not set out in the disclosure. This manner of reporting the co-borrowing debt was vetted with, and approved by, Deloitte and by Adelphia's outside counsel, Buchanan Ingersoll, a major Pittsburgh-based law firm. Tr. 6841-45, 6854-55, 7000-03, 7070-73 (Brown). And as we show below appears to be consistent with FAS-5. *Infra* at 24-25.

[7] Adelphia's 10K for 2000 was filed on April 2, 2001. A-3857-77.1. This date is important because it is the latest date alleged in the indictment on which the Rigases "fraudulently" failed to report the RFE co-borrowings as an Adelphia liability on Adelphia's financial statements.

however, had borrowed significant additional amounts from banks under stand alone facilities. Tr. 3901-02 (Bilotti).

5. Use of the Co-Borrowed Funds

The RFEs used these co-borrowed funds for two principal corporate purposes. First, the RFEs used significant amounts of co-borrowed funds to acquire cable systems when Adelphia did not wish to bear the full cost of an acquisition itself. Tr. 1365-66. Second, the RFEs used significant amounts of co-borrowed money to purchase stock from Adelphia whenever Adelphia raised capital by selling stock to the public.[8]

Adelphia's investment advisors, Salomon Smith Barney, and the Buchanan law firm, urged the Rigases to purchase Adelphia stock. *E.g.*, A-3971; A-3990; A-3984. Such purchases enabled the Rigases to maintain voting control of Adelphia, which was important since loss of control was an event of default under all of Adelphia's loan agreements. A-3971; Tr. 1450 (Coyle). Thus, the Board deemed such purchases to be "in the best interests of the Company." *E.g.*, A-3975; A-3995; A-3985. The government conceded that using co-borrowed funds to buy Adelphia stock was not improper. Tr. 7203.

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[8] Co-borrowed funds were also used for business and other reasons by various RFEs and Rigases.

On two occasions, the RFEs paid for stock by *assuming*, or becoming the principal obligor on, co-borrowed debt previously carried on Adelphia's books. Tr. 9790-93, 9836-37 (Mulcahey). The amount of co-borrowed debt assumed was moved from Adelphia's books to the books of the RFEs. Tr. 8133-34 (Brown); Tr. 9792-93, 9839-40 (Mulcahey). As a consequence of these transactions, Adelphia's bank debt was reduced, and the RFEs (and the Rigases) were now responsible to use *their own wealth* to repay this money. As long as the Rigases and the RFEs had the ability to repay the assumed debt, Adelphia received full value for its stock.

6. The Debt Reclassifications

As a matter of convenience, newly borrowed funds were usually drawn into an Adelphia account and were treated at first as having been borrowed by Adelphia. Tr. 7067 (Brown). When funds were used by the RFEs, the debt was reclassified at the end of each quarter as a debt the RFEs owed the banks. Tr. 4365-67, 4598-99 (Helms).[9] As one would expect, Adelphia's debt to the banks was reduced by a like amount. As already stated, the accounting was subject to audit by Deloitte, and it regularly gave Adelphia "clean" opinions. Tr. 4512-13, 4821-22, 4945-47 (Helms); 9769-72 (Mulcahey).[10]

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[9] This became standard practice in September 2000, and was done prior to that date in connection with some transactions.

[10] Every transaction between Adelphia and an RFE was reflected on the books of both the RFE and Adelphia. Tr. 8441-43 (DiBella).

7. Ability to Repay

As already stated, the assumption of debt by the RFEs benefited Adelphia only if the RFEs could repay it. The assets of the RFEs and the Rigas family consisted mainly of RFE cable assets and Adelphia securities. At the end of 2000, the value of these assets exceeded the size of the RFEs' debt by between $1.2 billion and $1.5 billion. There was, therefore, substantial evidence in the record of the RFEs' ability to repay their share of the debt, which is the basic issue under FAS-5. A-3653; Tr. 6606 (Brown).[11]

* * * * *

It is Petitioners' position that the accounting for co-borrowed debt is governed by a written rule promulgated by the Financial Accounting Standards Board ("FASB") known as FAS-5, which is a part of GAAP. FAS-5 is described in greater detail *infra* at 23-25. In brief, it requires contingent debt to be carried as a liability on a company's balance sheet only if it is "probable" that the company will have to pay that debt. The disclosure requirements for

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[11] At times during the trial, the government disputed the Rigases' ability to pay. However, the government took the position below on more than one occasion that the Rigases' ability to repay was not important to its case. At one point the government opposed defense efforts to call an expert witness to testify that the Rigases *had* the ability to repay, on the ground that the government was not going to contend otherwise. Tr. 8651, 8657.

contingent debt are also governed by FAS-5. *See infra* at 24-25.

It is also Petitioners' position that they complied with both the accounting and disclosure provisions of FAS-5. The government, of course, was entitled to contend otherwise and argue, for example, that it was probable that the RFEs would not be able to repay their share of the debt. If the jury agreed with the government on this point, it would follow that the RFEs' share of the co-borrowed debt should have been carried by Adelphia as a liability. The fatal error, however, was that the prosecution never acquainted the jury with the terms of FAS-5. Consequently, there is no reason to believe the jury found that its terms were violated.

B. PROCEEDINGS BELOW

1. Events Leading to Indictment

By early 2002, the RFEs' co-borrowed debt had grown to approximately $2.5 billion. Moreover, the SEC had issued new guidance on "off balance sheet" debt. Tr. 7007 (Brown). And Deloitte, Adelphia's auditors, decided that additional disclosures should be made. *Id.* at 7007-08. On March 27, 2002, Adelphia disclosed the amount of the RFE share of the co-borrowed debt. A-3724.

The price of Adelphia's stock dropped by about 30 percent in the days following the disclosure, and government investigations began. Tr. 5312 (Chrosniak), 7009-10 (Brown). Deloitte and the SEC could not agree on the manner in which the co-

borrowed debt should be accounted for on Adelphia's 10K for 2001, due to be filed April 1, 2002. And Deloitte eventually declined to sign Adelphia's 10K for the year ending 2001. This was an event of default on all of Adelphia's bank loans; and in June, 2002, Adelphia had to file for protection under the bankruptcy laws. Tr. 10254-55; 9849-56 (Mulchany).

2. **The Indictment**

The indictment was filed in September 2002. It named Petitioners as defendants. It also named John Rigas' son Michael Rigas, Adelphia's Executive Vice President for Operations; and Michael Mulcahey, Adelphia's Assistant Treasurer. The indictment charged fifteen counts of securities fraud, five counts of wire fraud, two counts of bank fraud, and one count of conspiracy to commit those offenses and to falsify Adelphia's books and records. *See* 79a-173a.

More specifically, the indictment alleges five frauds under five roman numeral headings. *See* 104a-154a. The first three headings relate to securities fraud; the fourth relates to bank fraud; and the fifth relates to the allegedly improper use of Adelphia assets for personal purposes. Of the three headings relating to securities fraud, the first two involve co-borrowing.[12]

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[12] The third involves alleged overstatement of Adelphia's operating results.

3. The Co-Borrowing Fraud Allegations

Under the first heading, the indictment alleges that the petitioners made "false and misleading statements" concerning "Adelphia's 'off balance sheet' debt." 103a-104a. Specifically, the indictment alleges that Petitioners understated Adelphia's liabilities on Adelphia's 10K for 1999 by omitting $250 million in co-borrowing debt; and it alleges that Petitioners understated Adelphia's liabilities on Adelphia's 10K for 2000 by omitting $1.5 billion in co-borrowing debt. 105a (¶¶69, 70).[13]

Under the second roman numeral heading, the indictment alleges that Petitioners moved co-borrowed debt from Adelphia's books to the RFEs' books when the RFEs assumed the debt as payment for Adelphia stock. The indictment alleges that removing the debt from Adelphia's books was improper because Adelphia remained "jointly and severally liable" for it. 107a-108a.

The allegations in both of these first two headings presented the question *whether the RFEs' share of the co-borrowed debt, for which Adelphia was contingently liable, should have been shown on Adelphia's books as a liability.*

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[13] The indictment also alleged that, "pursuant to GAAP," Petitioners were required to disclose the full amount of the co-borrowing debt in the footnotes to the financial statements and that they failed to do so. *Id.* (¶67).

4. The Trial

At trial, the government conceded that the co-borrowings by the RFEs were not unlawful (Tr. 11399), and that the use of co-borrowings to purchase Adelphia stock was also not unlawful. Tr. 7203. The allegations of co-borrowing fraud presented instead issues of accounting and disclosure.

The question whether the RFEs' share of the co-borrowed debt should have been carried on Adelphia's books as a liability presented an issue of accounting outside the ken of lay jurors. It is an issue governed by FAS-5, a written accounting rule promulgated by the Financial Accounting Standards Board ("FASB") that is a part of GAAP.[14] The trial judge repeatedly expressed his view that the government should call an accounting expert. Tr. 1346, 3834, 8029; A-492 ("I think I expressed the view before the trial began, many, many times in the course of the trial, that it would be helpful for there to be an accounting expert"). That is what is normally done in a complex accounting fraud case, and is required to establish civil liability. But the government made a deliberate decision to avoid calling one here.

Instead, the government acknowledged at the close of the evidence that "we didn't prove up the

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[14] FAS-5 also addresses and governs the question of what should be disclosed on a company's financial statements in the case of contingent debt if the debt is not shown as a liability. *See infra* at 24-25.

GAAP issues at all or offer expert testimony about that subject." Tr. 10527-28. Surprisingly, they then asked the court to redact all references to GAAP in the version of the indictment submitted to the jury. The trial court declined to do so. *Id.*

Instead of calling an expert and acquainting the jury with FAS-5, the prosecutors urged the jury to decide for itself, without regard to accepted accounting rules, that the contingent debt should have been shown on Adelphia's books. Thus, for example, they repeatedly had non-experts contend – and they themselves argued – that Adelphia received "nothing" when the RFEs assumed the obligation to pay co-borrowed debt previously carried as a liability on Adelphia's books. *E.g.*, Tr. 8538, 8541, 8594 (DiBella); 6737-38, 6741-42, 6757, 6782 (Brown).[15]

At the close of the trial, the jury returned verdicts of guilty against Petitioners for securities fraud and conspiracy to commit securities fraud. The jury also convicted them for bank fraud and conspiracy to commit bank fraud.[16] The jury acquitted them on the wire fraud and conspiracy to commit wire fraud charges. The jury was undecided

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[15] Petitioner Tim Rigas did not call witnesses in his defense. Petitioner John Rigas called character witnesses and two witness who impeached testimony by certain prosecution witnesses. Both Petitioners contended, based on the documents and testimony placed in the record by the prosecution, that the prosecution had failed to prove that they had committed any crimes.

[16] The bank fraud evidence will be discussed separately below.

on the charge of conspiracy to falsify Adelphia's books and records.[17]

On June 20, 2005, the trial court imposed a sentence of 20 years imprisonment on Tim Rigas, and fifteen years imprisonment on John Rigas. John Rigas, who is 82 years old and has a history of health issues, is subject to release after two years, if it is determined that he has less than three months to live.[18]

On July 13, 2005, the trial judge granted Petitioners' motions for bail pending appeal, finding that there were substantial appellate issues which could result in a reversal or a new trial on every count of conviction.

5. The Court of Appeals' Decision

Petitioners appealed their securities fraud related convictions to the Court of Appeals for the Second Circuit. They argued that they were entitled to have their conduct in reporting co-borrowed debt judged against the governing rule of GAAP – FAS-5. Consequently, they argued that before the prosecution could ask the jury to convict them for not

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[17] As to Michael Rigas, the jury acquitted on the conspiracy count and the wire fraud counts, and failed to reach a verdict on the remaining counts. The jury acquitted Mr. Mulcahy on all counts.

[18] Tim Rigas' bank fraud sentences, and his securities fraud related sentences, each totaled 20 years and ran concurrently with each other. John Rigas' 15 year sentences were similarly configured.

including the RFEs' share of the co-borrowed debt as a liability on Adelphia's balance sheet, the prosecution was required 1) to call an accounting expert and acquaint the jury with the applicable accounting rule, and 2) establish to the jury's satisfaction that petitioners had violated the rule.

The court of appeals rejected Petitioners' argument, essentially for two reasons. First, the court said that "GAAP rules do not govern whether Adelphia's disclosures regarding the Co-Borrowing Agreements were false and fraudulent" (26a) and that "compliance with GAAP is relevant only as evidence of whether a defendant acted in good faith." 22a.[19] The court of appeals is almost surely wrong in this. As we show below, the SEC *requires* public companies to follow GAAP generally, and the FASB's rules in particular, in preparing their public financial statements. The indictment alleges that petitioners misrepresented Adelphia's liabilities by omitting the RFEs' share of the co-borrowed debt. As to that alleged fraud, FAS-5 provides the substantive rule of conduct: Adelphia's liabilities cannot be said to be misrepresented if they were reported in accordance with FAS-5 and with GAAP.

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[19] In making these statements, the court of appeals purported to rely on Judge Friendly's opinion for the court in *United States v. Simon*, 425 F.2d 796, 805-06 (2d Cir. 1969). However, *Simon* involved a disclosure issue that was not in any way addressed by any rule of GAAP. And Judge Friendly carefully limited his opinion to situations in which "the accountants' testimony was not based on specific rules or prohibitions to which they could point." *Id.* at 806.

Stating that the jury was entitled to convict "even if Defendants complied with GAAP," the court of appeals faulted Petitioners for "reclassifying" co-borrowed debt. 23a. Reclassifying co-borrowed debt means moving it from Adelphia's books to an RFE's books when the RFE has assumed the obligation to repay it. 9a-10a. But the question whether the RFEs' share of co-borrowed debt should also appear as a liability on Adelphia's "books" is *governed* by FAS-5. And the jury could *not* have convicted Petitioners for reclassifying co-borrowed debt if they complied with GAAP.

Second, the court pointed to the fact that there were other lesser frauds alleged in the indictment that might have supported a conviction for securities fraud. 23a-24a. Thus, for example, the court points to an allegation that Petitioners represented to the public that they were purchasing Adelphia stock with "immediately available funds", *i.e.*, cash, rather than assumption of debt. 23a. The problem with this reasoning is that it assumes the jury convicted on this alleged fraud. But there is no way to know whether the jury convicted Petitioners on this theory or not.[20] As we discuss below, the normal rule is

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[20] Indeed, it would seem unlikely that it did. The government's investment analyst witness testified that he believed from public disclosures that the Rigases were paying for their stock with "cash or cash equivalents," such as "assum[ption of] debt." Tr. 3733-34 (Bilotti). And defendant Mulcahey, who personally implemented the transactions involved in the immediately available funds allegations, testified he thought assumption of debt was "immediately available" funds (Tr. 10202), and he was acquitted.

that if one of several theories of guilt is erroneously presented to the jury, a new trial is required, even if there are other theories that might have supported the verdict. *See* 32-34, *infra*.

Petitioners also appealed their bank fraud convictions to the court of appeals. The court of appeals reversed one of the two bank fraud convictions and remanded for resentencing. This portion of the court of appeals decision is discussed at 34-37, *infra*.

REASONS FOR GRANTING THE WRIT

1(A). The decision of the court of appeals boldly proclaims that "GAAP rules do not govern" how public companies should prepare their financial statements, and are relevant only to a defense of good faith. This is a profoundly destabilizing holding. It would permit prosecutors around this country, who disagree with the carefully crafted rules of the FAS, to prosecute corporate officials and auditors who follow them. And it would permit juries, who nearly always decide such cases only after the collapse of the corporation in question, to convict officials and auditors, who they are likely to blame for the collapse, even if they followed applicable accounting rules.

The decision is almost certainly incorrect. GAAP rules *do* govern how public companies must prepare their financial statements and what liabilities must be placed on a company's balance sheet. The decision below, then, conflicts with *United States v. Lake*, 472 F.3d 1247 (10th Cir.

2007), holding that where an SEC rule governs a disclosure issue, the prosecution must advise the jury of its terms and establish that it was violated. *See infra* at 25-26.

The decision below also conflicts with the decisions of numerous other courts that state that GAAP rules govern how public companies must prepare their public statements. *See infra* at 22-23. The decision below is also contrary to statements of the SEC and of the United States Congress to the same effect.

Congress has delegated to the SEC the power to establish the manner in which public companies will prepare their public financial statements including specifically their "balance sheets" and "earning statements." 15 U.S.C. § 78m(b)(i); 15 U.S.C. § 78s(a). Thus, Congress has authorized the SEC to "prescribe the methods to be followed in the preparation of accounts and the form and content of financial statements to be filed under the [Securities] Acts. . . ." STATEMENT OF POLICY ON THE ESTABLISHMENT AND IMPROVEMENT OF ACCOUNT PRINCIPLES AND STANDARDS, Accounting Series Release No. AS-150, 1973 WL 149263, at *1 (Dec. 20, 1973). The *purpose* of this delegated authority is "to assure that investors are furnished with information necessary for informed investment decisions." *Id.*

In exercising this authority, the SEC has "historically looked to the standard setting bodies designated by the accounting profession to provide leadership in establishing and improving accounting principles." *Id.* Currently, SEC delegates its

authority to the FASB. Thus, the Senate Banking Committee responsible for the Sarbanes-Oxley legislation stated in its report:

> Since 1973, the SEC has generally required public companies operating in the United States to prepare their financial statements in accordance with "principles, standards, and practices" promulgated by the Financial Accounting Standards Board (the "FASB") in the absence of specific SEC pronouncements on particular accounting questions.

S. REP. NO. 107-205, at 13 (2002). Similarly, the SEC noted recently that, "registrants are required to continue to comply with those [FASB] standards in preparing financial statements filed with the Commission, unless the Commission directs otherwise." SEC RELEASE NO. 33-8221, at 1 (April 25, 2003).

The FASB's pronouncements become part of the body of Generally Accepted Accounting Principles ("GAAP") that courts have uniformly required public companies to follow in preparing their public financial statements. *See, e.g., Greenstone v. Cambex Corp.*, 975 F.2d 22, 24 (1st Cir. 1992) (Breyer, J.) (noting that SEC generally requires compliance with GAAP); *In re Checkosky*, 23 F.3d 452, 472 (D.C. Cir. 1994) (SEC requires auditors to state whether financial statements comply with GAAP); *Adams v. Amdahl*, 2006 U.S. Dist. LEXIS 65426, at *9 (W.D. Wash. Sept. 12, 2006) ("The SEC requires the use of the Generally Accepted Accounting Principles"); *In re*

Campbell Soup Co. Sec. Litig., 145 F. Supp.2d 574, 592 (D.N.J. 2001) ("whatever form GAAP does take, the SEC requires general compliance").

Moreover, the courts have confirmed that FASB is the most authoritative source for GAAP. *See Ganino v. Citizens Util. Co.*, 228 F.3d 154, 160 n.4 (2d Cir. 2000) ("The SEC treats the FASB's standards as authoritative"); *UAW Local No. 1697 v. Skinner Engine Co.*, 188 F.3d 130, 136 n.4 (3d Cir. 1999) ("The FASB is a private professional organization which establishes standards for financial accounting and reporting. Those standards *govern*, for example, the preparation of financial reports. They are officially recognized as authoritative by, among others, the Securities and Exchange Commission") (emphasis added).

Here, the FASB has developed standards directly relevant to the issue of how contingent debt should be accounted for and disclosed. They are contained in FAS-5 and are a part of GAAP. The final statement on accounting for contingencies, contained in FAS-5, was issued in March 1975 after full notice and comment procedures. A-521, *et seq.*

Under FAS-5, the question whether a contingent debt must be accounted for or disclosed as part of a company's financial statements depends on the likelihood that the company will have to pay it. FAS-5 thus characterizes contingencies as probable, reasonably possible, and remote, defining those terms as follows:

a) *Probable.* The future event or events are likely to occur.

b) *Reasonably possible.* The chance of the future event or events occurring is more than remote but less than likely.

c) *Remote.* The chance of the future event or events occurring is slight.

FASB Statement No. 5 ¶3 (A-524).

FAS-5 directs a company to *accrue* a contingency – *i.e.*, carry the contingency on its books as a liability – if it is *probable* that a liability has been incurred at the date of the financial statement and the amount can be reasonably estimated. *Id.* ¶8 (A-525-26). It is Petitioners' position as it was Deloitte's position that – given the ability of the Rigases to repay their co-borrowed debt – there was no obligation under FAS-5 for Adelphia to carry that debt on its books at least up to and including the date of the filing of Adelphia's 10K for the year 2000. The prosecution disagreed. However, since the prosecution never informed the jury of FAS-5's requirements, there is no reason to believe the jury ever passed on this issue.

FAS-5 directs companies to *disclose* a contingent liability "when there is at least a *reasonable possibility* that a loss or an additional loss may have been incurred." *Id.* ¶10 (A-526; emphasis added). "The disclosure shall indicate the nature of the contingency and shall give an

estimate of the *possible loss or range of loss. . . .*" *Id.* (emphasis added). It is Petitioners' position as it was Deloitte's position that the disclosure in the notes to Adelphia's 10Ks for 1999 and 2000 of the *maximum potential amount* of Adelphia's liability as secondary obligor satisfied this requirement.[21] *See supra* at 8, n.6

In sum, FAS-5 sets forth the standards that govern the accounting and disclosure requirements for public companies in the case of contingent liabilities. Thus, FAS-5 is directly applicable to the proper method of accounting for and disclosure of that contingency here. *But the government never acquainted the jury with the provisions of FAS-5,* and never established that it had been violated.

The SEC authorized the FASB to develop and promulgate written rules that govern accounting practices throughout this country, *because it wants those rules to be uniform and to be followed.* Indeed, a GAAP rule has the same legal force as any SEC rule governing disclosure obligations. And the decision of the court of appeals below is thus squarely in conflict with the decision of the Tenth Circuit in *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007).

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[21] The FASB's interpretation of FAS-5 in 2002 states that, in the case of a debt quantity, FAS-5 requires disclosure of the "*maximum potential amount* of future payments (undiscounted) the guarantor could be required to make under the guarantee." FASB Interpretation No. 45 ¶ 13 (A-562; emphasis added).

In *Lake*, the indictment charged that defendants filed false 10K reports with the SEC in that they "failed to disclose" the value of their "personal use of corporate aircraft." *Id.* at 1250. However, SEC regulations required such disclosure only under certain circumstances. *Id.* at 1257-58. The Tenth Circuit reversed the defendants' convictions because the government neither informed the jury of the applicable disclosure standards, nor proved that those standards had been violated. *Id.* at 1259-60. Thus, the court stated: "But the government made no effort to inform the jury of what was specifically required by SEC regulations, contending that the regulations were irrelevant." *Id.* at 1253.

Hence, as in *Lake*, the prosecution neither informed the jury of the terms of the governing rule, nor proved that it had been violated. The court of appeals' decision below thus conflicts with *Lake*, and with the several court of appeals decisions pointing out that GAAP rules *do* govern how public companies prepare their financial statements.

1(B). The decision below also holds that the prosecution has no burden to call an accounting expert, even in a case presenting, and turning upon, accounting issues outside the ken of lay jurors. This holding conflicts sharply with the uniform practice in civil cases, under which the party with the burden of proof on such an issue must call an expert or suffer dismissal of its claim. This rule applies *inter alia* in civil securities fraud cases, and accounting

malpractice cases,[22] whenever the plaintiff's claim depends for its resolution on issues of accounting outside the knowledge of lay jurors.

Thus, it is well-accepted that "if a party seeks to prove an issue that is beyond the ken of the jury, that party *must* present expert testimony." Kaye, et al., THE NEW WIGMORE: *Expert Evidence* § 1.6 (2004) (emphasis in original). In civil securities fraud actions, courts have routinely required expert testimony to demonstrate the existence of a GAAP violation or irregularity. *See, e.g., Garnac Grain Co., Inc. v. Blackley*, 932 F.2d 1563, 1566 (8th Cir. 1991) ("demonstrating violations of GAAS requires expert testimony"); *SEC v. Guenthner*, 395 F. Supp.2d 835, 846 (D. Neb. 2005) ("Establishing that an accounting practice or method is inconsistent with GAAP requires expert testimony"); *Danis v. USN Comms., Inc.*, 121 F. Supp.2d 1183, 1192 (N.D. Ill. 2000) ("Violations of GAAP and GAAS standards are established through expert testimony"); *In re Rent-Way Sec. Litig.*, 305 F. Supp.2d 491, 500 (W.D. Pa. 2003) ("As is readily apparent, the Plaintiffs' theory in this case involves complex accounting issues concerning which expert interpretation and testimony would be required"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp.2d 358, 362 (S.D.N.Y. 2002) ("Many of these issues would require proof through expert testimony concerning such issues as proper accounting practices"); *Neuberger v. Shapiro*, 110 F. Supp.2d 373, 378 (E.D. Pa. 2000) ("as to

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[22] *See* cases cited in Petitioners' Main Brief (at 58-59) filed in the court of appeals.

Cogen, Sklar's accounting decisions, extensive expert testimony would certainly be required on the nature of the accounting practices, the significance of various decisions in relation to GAAP, and the effect that those practices ultimately had on plaintiffs' certificates"; quotation omitted); *In re Discovery Zone Sec. Litig.*, 943 F. Supp. 924, 935 n.9 (N.D. Ill. 1996) ("Again, [regarding GAAP], the merits of amortization versus expensing under these facts is a topic to be explored by accounting experts"); *In re Rospatch Sec. Litig.*, 1991 U.S. Dist. LEXIS 20477, at **3-4 (W.D. Mich. Oct. 11, 1991) ("Proper accounting principles should be established by expert testimony, not by comparison with the procedures of other companies").

Commentators likewise agree that expert testimony must be employed to demonstrate the existence of civil and criminal liability in cases involving accounting fraud. *See, e.g.*, Rossi, EXPERT WITNESSES, at 379, 381-82 (1991) (in cases "challeng[ing] financial statements audited by the accountant . . . there is no effective alternative for either side to hire an independent accounting expert" and noting that expert testimony is essential to show compliance/noncompliance with GAAP); Arkin, *et al.*, BUSINESS CRIME § 4-17.13 (1995) (due to complexities of securities practices and regulations, prosecutors are expected to use experts to present its case); Naftalis, WHITE COLLAR CRIMES, at 275 (1980) ("prosecutions depend upon the opinion testimony of these [accounting] experts on matters that strike at the very heart of the case, such as proper accounting procedures, value of corporate shares, and the

propriety of claimed tax deductions"); Barber, *Criminal Enforcement of Florida 's Securities Laws*, 79 FLA. BAR J. 8 (2005) (expert testimony generally necessary on both sides for securities prosecutions).

Not surprisingly, in a parallel civil proceeding brought by the SEC against a Deloitte partner who approved the manner in which Adelphia accounted for the co-borrowed debt, the SEC called an accounting expert. According to the Administrative Law Judge, that expert "conceded that the joint-and-several liability provisions of the [co-borrowing agreements] were not sufficient, on their own and without resort to FAS-5, to support his conclusion that most co-borrowed debt should have been booked as Adelphia's liability." *In re Dearlove*, Initial Decision Release No. 315, 2006 SEC LEXIS 1684, at *43 (July 27, 2006).

It is intolerable that the rule on this issue should be inapplicable to criminal cases. In other contexts, this Court has repeatedly noted that in construing "hybrid" statutes (*i.e.*, statutes that have both civil and criminal implications) courts should apply the same standards whether the case is civil or criminal. *See, e.g., United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518-19 n.10 (1992); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943). Following this principle, federal courts have recognized for nearly forty years that "the same standards apply to civil and criminal liability under the securities law." *United States v. Gleason*, 616 F.2d 2, 28 (2d Cir. 1979) (citing *United States v. Peltz*, 433 F.2d 48, 53 (2d Cir. 1970)). *Accord United States v. Boyer*, 694 F.2d 58, 60 (3d Cir. 1982) (no

reason to assume that Congress intended different scienter elements for civil and criminal securities fraud); *United States v. Charnay*, 537 F.2d 341, 348 (9th Cir. 1976) ("precedents established in civil cases interpreting [securities statutes] are applicable in criminal prosecutions"); *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp.2d 281, 388 n.164 (S.D.N.Y. 2003) ("Rule 10b-5 is interpreted identically in the civil and criminal contexts"); *United States v. Fields*, 1977 U.S. Dist. LEXIS 15588, at *73 (S.D.N.Y. June 3, 1977) (the meaning of § 14(a) in a criminal action is "the same" as in a civil action), *aff'd in part, rev'd in part*, 592 F.2d 638 (2d Cir. 1978); *United States v. Clark*, 359 F. Supp. 128, 130 (S.D.N.Y. 1973) ("in connection with" language of § 10(b) and Rule 10b-5 as interpreted in civil actions applies to criminal prosecutions). Numerous commentators have noted likewise.[23]

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[23] *See, e.g.*, Jacobs, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS § 12:161 (2003) (internal citations omitted) ("The elements necessary to prove a 10b-5 civil breach are the same elements as those required to demonstrate a criminal violation, except that a person must 'willfully' violate 10b-5 to be prosecuted criminally"); Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1, 51 n.261 (2002) ("aside from the burden of proof, the requirements for proving securities fraud in the criminal context are coextensive with the requirements in the civil context"; citing additional commentators); Lynch, *The Role of the Criminal Law in Policing Corporate Misconduct*, 60 LAW AND CONTEMP. PROBS. 23, 24 (1997) ("in cases arising out of the securities laws, and many other regulatory regimes, there is often no distinction between what the prosecutor would have to prove to establish a crime, and what the relevant

Indeed, if anything, the standards for imposing criminal liability in securities actions should be even more demanding than for those imposing civil liability. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part) (asserting that standards should be stricter for securities violations when criminal charges are brought); *United States v. Chiarella*, 588 F.2d 1358, 1377-78 (2d Cir. 1978) (Meskill, J., dissenting) ("Surely we should be even more fastidious in our construction of the [securities] statute when we are asked to review a criminal conviction"), *rev'd*, 445 U.S. 222 (1980).

Several federal cases have reversed convictions when the government failed to produce expert testimony when necessary.[24] Courts have dismissed civil securities fraud actions for failure to produce expert testimony attesting to GAAP violations. *See, e.g., Danis*, 121 F. Supp.2d at 1192

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administrative agency or a private plaintiff would have to show to prove civil liability").

[24] *See, e.g., United States v. Katz*, 178 F.3d 368, 373-74 (5th Cir. 1999) (requiring government to produce expert testimony regarding ages of post-puberty models in child pornography case); *Cook v. United States*, 362 F.2d 548, 549 (9th Cir. 1966) (requiring expert testimony to establish the illicit nature of a substance); *United States v. Klaw*, 350 F.2d 155, 167 (2d Cir. 1965) (reversing obscenity conviction when prosecution failed to produce expert testimony regarding community standards); *see also United States v. Rodriguez-Pacheco*, 475 F.3d 434, 464 & n.27 (1st Cir. 2007) (Torruella, J., dissenting) (arguing that expert testimony should be required to establish that virtual child pornography depicted real child).

(dismissing civil claim of accounting fraud when plaintiff failed to present expert testimony showing accounting violations).

We submit that the issue presented in this case is of importance to corporate CEOs, CFOs, and outside auditors throughout this country. The question whether clearly applicable rules of GAAP govern the propriety of accounting and disclosure in 10b-5 criminal cases is one on which there should be certainty, not confusion. We respectfully ask this Court to grant the writ and address it.

1(C). The issue cannot be avoided, as the court of appeals suggested it could be, simply because the government had other theories of securities fraud, *i.e.*, theories in addition to the co-borrowing theories that are governed by FAS-5. First, the co-borrowing fraud theories dwarfed the other ones: the prosecution claimed that the co-borrowing "frauds" resulted in Adelphia's bankruptcy and cost investors $4 billion. Tr. 11,196-98 (Summation). More dispositively, we submit that this case is governed by the rule in *Yates v. United States*, 354 U.S. 298 (1957). *Yates* holds that, if there is error in the presentation of one of several prosecution theories of guilt on a set of counts, the convictions on those counts must generally be set aside, because it is usually impossible to tell on which theory the jury's verdicts rested. *See id.* at 312 ("we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."). *See United States v.*

Foley, 73 F.3d 484, 493-94 (2d Cir. 1996) (same; reversing conviction when government presented two theories of tax fraud, and one theory was invalid); *see also United States v. Delano*, 55 F.3d 720 (2d Cir. 1995) (reversing RICO convictions despite presence of two legally sufficient predicate acts: proof concerning invalidated predicate acts dominated trial, and court "refuse[d] to hazard a guess" what the jury based its verdict on).

This case, we submit is not governed by the rule in *Griffin v. United States*, 502 U.S. 46, 49 (1991), that where one of the government's theories of guilt is invalid because of insufficiency of evidence, it is safe to presume that the jury did not rely on it, and the conviction may be affirmed if supported by another valid theory. The *Griffin* rule rests on the commonsense presumption that if two theories of guilt are alleged and there is no evidence to support one, it is safe to assume the jury based its verdict on the other. *See id.* at 59. However, *Griffin* also leaves in place the *Yates* rule that where legal error is present on one theory, a new trial is required because "there is no reason to think that [the jury's] own intelligence and expertise will save them from that error." *Id.* Here, the problem is that the jury was never told what accounting standards had been adopted by GAAP, and the jury thus lacked the ability to judge the Rigases' conduct against those standards. Thus, although the government's failure to call an expert on GAAP in one sense constituted a failure to meet its burden of proof, there is every reason for concern that the jury based its verdict on the erroneously presented co-borrowing frauds.

The prosecution's failure was analogous to presentation of a case to a jury without any instructions on the applicable legal standard. In such a case there is no reason to presume that the jury rested its verdict only on properly presented theories. *See, e.g., United States v. Scotti*, 47 F.3d 1237, 1246 (2d Cir. 1995) ("Because the jury may have reached its verdict [for conviction] on the basis of the legally inadequate instructions . . . we conclude that the district court did not abuse its discretion in granting [defendant] a new trial"); *United States v. McIntosh*, 124 F.3d 1330, 1335 (10th Cir. 1997) (reversing conviction for bankruptcy fraud when jury was improperly instructed as to one theory of fraud); *Sungia v. Bunnell*, 998 F.2d 664, 669 (9th Cir. 1993) ("We cannot tell what theory the jury used. . . . Of course, we cannot assume that the jury ignored the [erroneous legal] instruction").

2. The court of appeals reversed and dismissed Petitioners' convictions on one of two bank fraud counts. However, the court of appeals overlooked the fact that it follows necessarily from that reversal that petitioners are entitled to a *new trial* on the other bank fraud count. While this perhaps does not present an independently certworthy issue, if the Court is inclined to grant the writ on issues A and B above, Petitioners ask that the Court take the entire case and order a new trial on the remaining bank fraud count. 48a-49a, 56a & n.40.

The factual context giving rise to the court of appeals bank fraud rulings is as follows. Under the loan agreements with the banks, each Adelphia

subsidiary that was in the borrowing group was required to report every quarter on its "leverage ratio". The leverage ratio is a ratio of debt to cash flow. Under the loan agreements, when the ratio reached certain thresholds, the interest rate on the loan went up. 47a-57a.

The government presented a theory of guilt to the jury that certain allegedly "sham" marketing support agreements entered into by Adelphia at the corporate level inflated cash flow, and "trickled down" to the Adelphia subsidiaries that were in the borrowing group, thereby improperly affecting their leverage ratios (the "trickle down theory"). The problem with this theory of guilt was that the government never offered any proof that this had the effect of pushing the leverage ratio of the borrowing group members across any threshold that affected the applicable interest rate. Petitioners contended that any effect on the leverage ratios was thus not shown to be material. 47a.

The trial judge rejected Petitioners' contention, holding that the marketing support payments were "capable of" affecting the interest rates, and "potentially" affected them, and that that was enough to meet the applicable materiality standard. 69a. However, the court of appeals disagreed. *See* 47a-57a.

As to one of the bank fraud counts, Count 23, the trickle down theory was the government's only theory of fraud. The court of appeals thus reversed Petitioners' convictions on that count and dismissed it. 57a.

As to the other bank fraud count, Count 22, the government had a second theory of fraud. The second fraud theory was that shortly after the end of the quarter, Adelphia subsidiaries outside the borrowing group forgave fees owed them by entities in the borrowing groups, thereby changing the leverage ratio and improving the interest rate. 37a. These forgivenesses were done by the defendant Mulcahey, who testified they were real, that they increased the wealth of the borrowing groups, that was what the banks wanted, and that there was no fraud. Tr. 9591-95 (Mulcahey). The government called no bank witnesses. And the jury acquitted Mulcahey. It is thus highly questionable whether the jury convicted Petitioners on this theory. Consequently, the court of appeals did not dismiss that count. However, since that count went to the jury on two theories, one of which was infirm, the Petitioners should have been entitled to a new trial. This is so because it is impossible to tell whether the jury verdict rested solely on the infirm theory. Reversal and a new trial are thus required under the rule of *Yates*.

This issue is not governed by the rule in *Griffin*, 502 U.S. at 49-50, holding that where the evidence on one of two theories of guilt is supported by insufficient evidence, it may be presumed that the jury did not rely on that theory. Here, to be sure, there is a sense in which the trickle down theory was held invalid for insufficient proof of materiality. However, the rule in *Griffin* should be held inapplicable for two reasons. First, here we *know* that the jury relied on the insufficient marketing

support trickle down theory in reaching its verdict on Count 23 – it was the government's *only* theory on that count. Therefore, we cannot presume that the jury did not rely on that theory in reaching its verdict on Count 22. Second, the court of appeals' holding on materiality was not based solely on its evaluation of the evidence. It was based on a legal analysis by which it rejected the trial judge's materiality standard. Thus, this case involves "legal insufficiency," not just "evidentiary insufficiency," and is outside the rule in *Griffin*. *See* 502 U.S. at 55 n.1. If the Court grants the writ, Petitioners request that the Court take the whole case so that the bank fraud error may be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 10, 2007

APPENDIX

APPENDIX A

05-3577-cr
United States v. Rigas

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: June 14, 2006 Decided: May 24, 2007)

Docket Nos. 05-3 77-cr(L), 05-3589-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

—v.—

TIMOTHY J. RIGAS AND JOHN J. RIGAS,

Defendant-Appellants.

Before:

MESKILL, CABRANES, AND WESLEY, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Southern District of New York (Sand, *J.*), entered on June 27, 2005, convicting Timothy J. Rigas and John J. Rigas of conspiracy to commit securities fraud, to make and cause to be made false statements in filings with the SEC, and to commit bank fraud under 18 U.S.C. § 371;

securities fraud under 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2; and bank fraud under 18 U.S.C. § 1344.

AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART.

JOHN W. NIELDS, JR., Howrey LLP, Washington, DC (Laura S. Shores, Jason C. Raofield, John F. Stanton, *on brief*), *for Defendant-Appellant Timothy J. Rigas.*

PAUL SHECHTMAN, Stillman, Friedman & Shechtman, P.C., New York, NY (Peter Fleming, Jr., Benard V. Preziosi, Jr., Jonathan Harris, and Julie V. Withers, Curtis Mallet-Prevost Colt & Mosle LLP, New York, NY), *for Defendant-Appellant John J. Rigas.*

RICHARD D. OWENS, Assistant United States Attorney for the Southern District of New York, New York, NY (Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY, Celeste L. Koeleveld, Assistant United States Attorney for the Southern District of New York, New York, NY, of counsel, *on brief*), *for Appellee United States.*

WESLEY, *Circuit Judge*:

Defendants Timothy J. Rigas and John J. Rigas ("Defendants") appeal from a judgment of conviction following a jury trial in the United States

District Court for the Southern District of New York (Sand, J.). Defendants were convicted of conspiracy to commit securities fraud, conspiracy to make and cause to be made false statements in filings with the SEC, and conspiracy to commit bank fraud under 18 U.S.C. § 371 (Count One);[1] securities fraud under 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2 (Counts Two through Sixteen); and bank fraud under 18 U.S.C. § 1344 (Counts Twenty-Two and Twenty-Three).

Defendants make four claims on appeal: (1) the government should have been required to present evidence that Defendants violated Generally Accepted Accounting Principles ("GAAP") and to call an accounting expert; (2) government witness Robert DiBella improperly gave expert accounting testimony; (3) the bank fraud convictions should be vacated because the indictment was constructively amended or they should be reversed because there was insufficient evidence for the jury to find that any misrepresentations to the bank were "material"; and

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[1] We note that there appears to be some inconsistency in the record regarding the jury's verdict on this Count. The transcript of the trial reflects that the jury found both Timothy Rigas and John Rigas guilty of conspiracy to commit securities fraud, conspiracy to make and cause to be made false statements in filings with the SEC, and conspiracy to commit bank fraud, and it found them not guilty of conspiracy to commit wire fraud. It was undecided on conspiracy to falsify books and records of a public corporation. The judgment for Timothy Rigas, however, recites that the jury found him guilty of "[c]onspiracy to commit securities fraud, wire fraud, making false statements." John Rigas's judgment states he was found guilty of "[c]onspiracy to commit securities fraud, wire fraud, making false statements and bank fraud." The parties may address any arguments regarding the consequences of these inconsistencies to the district court in the first instance.

(4) Defendants were prejudiced by the improper admission of uncharged crime evidence, which also constituted a constructive amendment of the indictment.

For the reasons set forth below, we affirm the judgments of conviction on all Counts except Count Twenty-Three. We reverse Defendants' conviction on Count Twenty-Three, and we remand for an entry of a judgment of acquittal on this Count and for resentencing.

BACKGROUND

Adelphia Communications Company ("Adelphia") announced its 2001 Fourth Quarter and Full-Year results in a March 27, 2002 press release. In a footnote on the final page of that press release, Adelphia, at the recommendation of its accounting firm, Deloitte & Touche, first disclosed publicly that it had approximately $2.2 billion in liabilities not previously reported on its balance sheet.[2] On the

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[2] The footnote read as follows (dollar amounts are in thousands):

> Certain subsidiaries of the Company are co-borrowers with certain companies owned by the Rigas Family and managed by the Company ("Managed Entities") for borrowing amounts of up to $5,630,000. Each of the co-borrowers is liable for all borrowings under the credit facilities and may borrow up to the full amount of the facilities. Amounts borrowed under these facilities by the Company's subsidiaries are included as debt on the Company's consolidated balance sheet. Amounts borrowed by Managed Entities under the facilities are not included in the Company's consolidated balance sheet. The Company expects the Managed Entities to repay their borrowings in the ordinary course. The Company does not expect that it will need to repay the amounts borrowed by the Managed Entities. As of

day of disclosure, Adelphia's stock price plummeted by about twenty-five percent to $20.39; by the time the stock was delisted in May 2002, the price per share was A $1.16. The company filed for bankruptcy in June 2002, wiping out all shareholder value. A month later, John Rigas, his sons Michael and Timothy, and two other Adelphia employees were arrested and charged with looting the company.

THE STORY OF ADELPHIA

Adelphia, one of the largest cable television providers in the country before its bankruptcy, had modest beginnings. In the early 1950s, John Rigas, the son of Greek immigrants, borrowed money from his family to buy a movie theater in Coudersport, a small town about twenty miles south of the New York-Pennsylvania state line. In 1952, he purchased the rights to wire the town for cable television. By the time John Rigas's sons Michael and Timothy joined Adelphia in the mid-1980s, the privately owned company boasted hundreds of thousands of cable subscribers.

In 1986, John Rigas took Adelphia public Adelphia issued two classes of common stock: Class A, with one vote per share, and Class B, with 10 votes per share. The Rigas family owned almost all of the Class B shares, and, as a result, was able to maintain control of the company and the Board of

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December 31, 2001, co-borrowing credit facilities balances, net of amounts otherwise reflected as debt on the Company's consolidated balance sheet, totaled approximately $2,284,000. The related maturities of these amounts are as follows: approximately $0 in 2002, $26,000 in 2003 to 2005, $519,000 in 2006 and $1,739,000 thereafter.

Directors. Indeed, Rigas family members filled many of the top positions in Adelphia. John Rigas was Adelphia's President, Chairman of the Board, and Chief Executive Officer until he resigned in May 2002. Timothy Rigas served as Board member, Executive Vice President, and Chief Financial Officer. Michael Rigas was also on Adelphia's Board and was Executive Vice President for Operations. Another son, James, filled out the Rigases' majority control of the seven-member Board of Directors. Peter Venetis, John Rigas's son-in-law, was added to the Board when it expanded to nine members.

Not all of the companies controlled by the Rigas family went public when Adelphia did. Rather, Adelphia managed some of the cable companies—the Rigas Managed Entities ("RMEs") [3] —that the family continued to own privately. Adelphia's management of the RMEs was disclosed in public filings; however, Adelphia did not disclose the amount of the fees charged to, or paid by, the RMEs, or that cash generated from the RMEs was commingled with that generated by Adelphia. Certain transactions between Adelphia and the RMEs were at issue during the trial; the government argued that Defendants utilized the Adelphia-RMEs business arrangement to effect and conceal aspects of their frauds.

Adelphia's business during the time relevant to this case was "cash flow negative." That is, it did

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[3] Other Rigas family-owned entities operated merely to hold securities beneficially owned by the family; they will be referred to as the Rigas Non-Cable Entities ("RNCEs"). The RMEs and RNCEs are together referred to as the Rigas Family Enterprises ("RFEs").

not generate enough cash revenue from subscriber fees to pay for its capital expenditures, interest payments, and cost of operations. Adelphia's capital expenditures included $1.5 to $2 billion per year to update its cable systems to higher bandwidth and two-way communication capabilities (the "Rebuild Plan"). Between 1998 and 2002, Adelphia paid approximately $5.2 billion in cash and issued more than 72 million new shares of Class A common stock to acquire other cable entities in an effort to lower costs as a result of operating efficiencies (the "Acquisition Plan"). Banks and holders of Adelphia stocks and bonds watched as Adelphia's leverage ratios climbed. Indeed, as Moody's Investors Service noted in August 2001, Adelphia was "one of the most highly leveraged companies in the cable sector."

Adelphia set about raising sufficient capital to offset its annual operating losses, to fund the Rebuild and Acquisition Plans, and to pay down increasing interest expenses. This new cash mainly came from $4.9 billion in public sales of newly issued common and preferred stock, $4.4 billion in public sales of notes and convertible debentures, and bank loans.

Adelphia's disclosed bank borrowings were $5.4 billion in September 2001, more than a six-fold increase from March 1998. Generally, each separate bank loan was entered into by a group of Adelphia subsidiaries that pledged their assets as collateral; the group was referred to as a "borrowing group." Certain bank loans were set up through a "co-borrowing" arrangement (the "Co-Borrowing Arrangement") between the RMEs and Adelphia subsidiaries. Timothy Rigas proposed the Co-Borrowing Arrangement to the Adelphia Board in

1999, and argued it would lower borrowing costs and prevent competition for bank financing between the RMEs and Adelphia entities. Under this Co-Borrowing Arrangement and at the Rigases' direction, Adelphia entered into three separate "Co-Borrowing Agreements"—loans for which the RMEs and Adelphia subsidiaries were jointly and severally liable. These Co-Borrowing Agreements totaled about $5.5 billion. Adelphia's accounting firm, Deloitte & Touche, reviewed and approved the manner in which Adelphia disclosed and accounted for the co-borrowed debt on its public financial statements.

The Rigas family wished not only to expand Adelphia, but also to maintain control over the company, in part because Adelphia's loan agreements provided that the Rigases' loss of voting control would constitute default. To maintain family control, every sale of stock to the public required a concurrent sale of stock to the Rigases. Arguing that their stock purchases represented the family's "public vote of confidence" in Adelphia "because in addition to selling shares to the public, they were buying new shares, that is, they were investing fresh money of their own into the company," Timothy Rigas persuaded the Adelphia board to sell Class B shares to the Rigas family with each new offering to the public.[4] During the relevant time, family members purchased $1.6 billion in new shares.

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[4] Defendants continue to press the same views on appeal and also assert they were acting on the advice of investment advisors with only the best intentions of Adelphia in mind. We do not think these arguments preclude Defendants' criminal liability.

THE CHARGED CONDUCT

Timothy Rigas and John Rigas were charged with conspiracy to commit securities fraud, to commit wire fraud, to make and cause to be made false statements in filings with the SEC, to falsify the books and records of a public corporation, and to commit bank fraud under 18 U.S.C. § 371 (Count One); securities fraud under 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2 (Counts Two through Sixteen); wire fraud under 18 U.S.C. § 1341 (Counts Seventeen through Twenty-One); and bank fraud under 18 U.S.C. § 1344 (Counts Twenty-Two and Twenty-Three). The conduct underlying these charges, as set forth in the Superseding Indictment and the government's case at trial, is summarized below.

I. THE RIGAS FAMILY'S FRAUDULENT STOCK PURCHASES

The Rigases did not have enough cash to provide the promised "fresh money" for the shares they purchased to maintain control over Adelphia. The steps they took to purchase these shares constitute several of the charged frauds. The purchase agreements for the stocks required that at the closing date, the Rigases "shall deliver to the Company the purchase price for the Shares in immediately available funds"; Adelphia's public filings and press releases suggested to investors and analysts that the Rigases had paid cash for the stocks. However, this was not the case. Instead, for the earlier purchases, Defendants borrowed funds to pay Adelphia, but then caused Adelphia to use that cash to pay off other family debts. For the later purchases, Defendants caused Adelphia to "move"

debt it owed under the Co-Borrowing Agreements from its books to the books of one of the RMEs. The process of moving debt from Adelphia's financial statement to one of the RMEs' financial statements was called "reclassification," and the debt, itself, was referred to as having been "reclassified."

As the government argued at trial, even if the RMEs had assumed Adelphia's debts, Adelphia was worse off than if the Rigases had paid cash and Adelphia paid down its existing borrowings. When the Rigases assumed debt from Adelphia under one of the Co-Borrowing Agreements, Adelphia's capital funding strategy was adversely affected in two ways: first, Adelphia would still be liable for those debts because the Co-Borrowing Agreements provided for joint and several liability, and second, had the Rigases paid cash, those funds could have been used to pay down the debts on the Co-Borrowing Agreements, thus freeing up the credit available for Adelphia. Most importantly, the Rigases misrepresented that they paid cash for the stocks, raising the necessary funds from margin loans, from leveraging their private cable properties, and from outside investors, and that this cash would be used to pay down debts.

The government introduced evidence supporting its allegations that Defendants engaged in fraudulent securities purchases through, *inter alia*, the testimony of former members of Adelphia's Board, the stock purchase agreements, bank records, general ledger journal entries relating to the sales, and borrowing and paydown notices for the bank creditors.

II. THE TRANSFERS OF THE CO-BORROWING DEBT

The government also alleged that Defendants masked other debts that the Rigas family, the RMEs, and the RNCEs owed to Adelphia. Defendants accomplished this by reporting all the amounts the RMEs and RNCEs owed Adelphia as a single "related party receivable," which they reported on a net basis—that is, Adelphia's financial statements did not itemize the amounts owed by each of the RFEs, but instead listed a single figure which "netted" all the payables and receivables related to the RFEs on a combined basis. The reclassification scheme used to effectuate the stock sales described above also contributed to this concealment.

By reporting the amounts owed as a related party receivable, Defendants masked both the actual amount of cash advanced to the RMEs and the RNCEs and the fact that the cash was advanced to RNCEs that Adelphia did not manage. Once this net related party receivable reached $200 million, Vice President of Finance James Brown and Timothy Rigas discussed masking the size of the receivables by moving debt from Adelphia's books to the RMEs' books. As an example, Adelphia might move $20 million of debt owed to the banks under the Co-Borrowing Agreements to an RME's books; Adelphia would then credit the RME with the $20 million assumption of debt, thus decreasing the amount the RME owed Adelphia by $20 million. Brown testified that this arrangement provided no benefit to the Adelphia shareholders, but merely avoided disclosing on Adelphia's books the high net receivable balance from the RMEs. After the first reclassification of over $200 million, additional debt

was reclassified on quarterly basis. In total, the Rigases reclassified over $2.8 billion dollars worth of debt, including the stock purchase reclassifications, from the first quarter of 2000 until the end of the conspiracy.

These reclassifications were memorialized only in general ledger journal entries; neither Adelphia nor the RMEs executed formal assumption agreements. As the reclassified funds had been borrowed under the Co-Borrowing Agreements, Adelphia would still be liable for the full amount due if the RMEs were unable to pay the debt. The government argued, and the jury apparently agreed, that these ledger entries were fraudulent and intended to mislead stockholders and analysts about the debt the Rigas family and the RFEs owed to Adelphia.

III. FRAUD REGARDING ADELPHIA'S OPERATING PERFORMANCE

The government also alleged that Defendants misrepresented three key indices of Adelphia's performance: (1) its basic cable subscriber growth; (2) its success in rebuilding its cable systems; and (3) its pro forma earnings, measured in terms of "Earnings Before Interest, Taxes, Depreciation, and Amortization" ("EBITDA"). [5] These misrepresentations allowed Adelphia to appease

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[5] EBITDA is calculated by subtracting operating expenses from operating revenue. Also excluded from EBITDA calculations are (1) other current expenses, such as interest and taxes, and (2) non-cash expenses such as depreciation. An increase in a company's interest expenses will not lower its EBITDA, and capital expenses do not immediately affect a company's EBITDA.

investors and comply with covenants under its bond indentures, and they affected indices used to set interest rates under its various bank loans. They were disseminated to the public through Adelphia's SEC filings and quarterly press releases, and through conference calls, conferences, and "road shows" with investors. Given Adelphia's rapid expansion, and the associated cash flow deficits, investors were paying particularly close attention to the indices Adelphia manipulated.

a) Misleading Cable Subscriber Growth

The government provided proof that Adelphia distributed materially misleading cable subscriber growth numbers to the public from 2000 to 2002. Timothy Rigas directed or approved fraudulent quarterly earnings press releases, and John Rigas knew of and approved them. Karen Chrosniak, Adelphia's Director of Investor Relations, testified that Timothy Rigas and others directed her to add subscribers to the earnings releases to artificially increase Adelphia's reported basic subscriber growth rate.[6]

The government argued that Timothy Rigas directed the fraudulent inflation of Adelphia's basic subscriber number and basic subscriber growth rate by adding, in 2000, subscribers from companies in

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[6] Adelphia's annual reports stated that "[a] home with one or more television sets connected to a cable system is counted as one basic subscriber." Other subscriber categories included "digital subscribers" (homes with television sets that subscribed to digital cable services at a premium rate) and "Powerlink subscribers" (homes that subscribed to Adelphia's internet service).

Brazil and Venezuela in which Adelphia owned an interest. The government contended that including the subscribers artificially increased Adelphia's reported pro forma basic subscriber growth rate. The third quarter 2001 report was also increased, again at Timothy Rigas's instruction, to include 60,000 home security system subscribers, even though the home security subscribers were tallied separately from the cable subscribers and those home security subscribers who also had cable would, in effect, be double counted. Finally, after he learned that his projections to analysts had fallen short, Timothy Rigas instructed Chrosniak to inflate the 2001 year-end number of subscribers to the Powerlink internet service by including 7,000 "pending installs"—subscribers who had signed up for service but not yet started making payments to Adelphia as the service had not yet been installed—as actual subscribers. As a result of the fraudulent increases in subscriber growth rates, the year-end 2000 subscriber growth rate was reported as 1.3 percent and the year-end 2001 figure was reported as 0.5 percent. The actual figures were 0.5 percent and negative 1.2 percent.

b) Misrepresentations about the Rebuild Program

Adelphia expended between $1.5 and $2 billion annually to rebuild its cable system to provide digital cable and high speed internet access to its subscribers. As this enhanced technology was critical to the company's long-term health and the annual expenditures on it were substantial, investors closely followed the status of the Rebuild Program. But they were misled by Timothy Rigas, who, during

road shows, investor conferences, and shareholders' meetings, fraudulently overstated the percentage of Adelphia's systems that had been upgraded to higher bandwidth and two-way communication capabilities. Adelphia also gave these inflated numbers to its bank lenders.

c) Adelphia's Inflated EBITDA

Several witnesses testified that investors commonly use EBITDA to assess the earnings from operations of cable companies. Brown testified that he told John Rigas Adelphia's real EBITDA and how it compared with its competitors' results. Brown also told John Rigas what would happen if Adelphia reported the actual EBITDA: Adelphia would default on some of its public debt, its stock price could decline, and its interest expenses and the cost of borrowing from banks would increase. While John Rigas told Brown that Adelphia "needed to get away" from using what Brown described as "accounting magic" to manipulate the numbers, he never told Brown to stop manipulating the numbers.

The "accounting magic" used to manipulate EBITDA comprised two schemes: (1) fraudulent allocations of management fees that the RMEs owed to Adelphia and (2) "wash transactions" with Adelphia's suppliers.[7] Brown explained that he would arbitrarily inflate the management fees that

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[7] The wash transactions were, as Brown testified, "business transactions that were recorded that would affect one side of the company's ledger in a way that would benefit the EBITDA number and make it higher and . . . would lower something else that investors won't look at but that had no net economic impact on the company at all . . . ."

an RME owed to Adelphia, and then record a corresponding interest expense that Adelphia "owed" the RME. The interest expense would ensure that there was no real cost to the RME as a result of the scheme but, because it was interest, it would not be included in Adelphia's EBITDA. As a result, then, this scheme—which Timothy Rigas "went along with"—artificially inflated Adelphia's EBITDA.

In his testimony about the wash transactions, Brown indicated that Timothy Rigas discussed, and then implemented, schemes with two separate equipment suppliers, Motorola and Scientific Atlanta. The effect of the wash transaction schemes was to increase Adelphia's EBITDA by $87.1 million. In these schemes, Adelphia increased the price it paid to Motorola and Scientific Atlanta for digital converter boxes, and Motorola and Scientific Atlanta agreed to pay Adelphia the amount of the increase for advertising and market support. Because the payments to the equipment suppliers were booked as capital expenses, and the payments from the suppliers were booked as revenue, this scheme artificially inflated the EBITDA.[8] According to Brown, Timothy Rigas instructed him to book nearly

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[8] For example, Adelphia agreed to pay Scientific Atlanta $339 for each cable converter box. The two entities later agreed that Scientific Atlanta would increase the price of each box by $31, and Adelphia would charge an identical $31 per box for marketing support. Thus, Adelphia's capital expenses for each box were increased by $31 to $370. But Adelphia's current expenses were decreased, and its EBITDA was increased, by $31 per box. The effects of the marketing support scheme in the June 2000 and September 2000 quarters, for example, were an increase in Adelphia's EBITDA of $7 million and $12.8 million, respectively. The scheme with Motorola was similar, and had the same EBITDA-inflating effect.

$20 million in increased advertising revenue even before the two equipment suppliers agreed to the wash transaction scheme; Adelphia never provided any advertising services for these suppliers.

IV. THE SCHEME TO DEFRAUD ADELPHIA'S BANK LENDERS

The jury convicted Timothy and John Rigas of conspiracy to commit bank fraud and two substantive counts of bank fraud related to two of the three Co-Borrowing Agreements. [9] The Co-Borrowing Agreements [10] required minimum leverage ratios of debt to EBITDA[11] and tied interest rates to this leverage ratio. The government argued to the jury that the EBITDA manipulations resulted in lower interest payments to the banks than if the EBITDA had been accurately reported. The EBITDA manipulations were carried out at the level of the Adelphia parent company as described above. In addition, when Brown, Timothy Rigas, and Michael Mulcahey (a co-defendant of the Rigases who was Adelphia's Assistant Treasurer) determined

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[9] The three Co-Borrowing Agreements, which provided a total maximum borrowing capacity of about $5.5 billion, were: (1) the Hilton Head Communications and UCA Corp. ("UCA") Facility; (2) the Century ("CCH") Facility, and (3) the Olympus ("OCH") Facility. Counts Twenty-Two and Twenty-Three of the Superseding Indictment charged Defendants with bank fraud regarding the CCH Facility and the OCH Facility.

[10] The direct borrowers on the Co-Borrowing Agreements were Adelphia subsidiaries and a few of the RMEs. The manipulations of Adelphia's EBITDA "trickled down" to the subsidiaries' financial statements.

[11] The leverage ratio was calculated by dividing the borrower's indebtedness by annual operating cash flow.

that the EBITDA of particular borrowing groups (the Adelphia and RME entities in each Co-Borrowing Agreement) was not high enough, expenses would be moved between the subsidiaries and affiliate or interest income would be transferred from one internal company to another.

V. LOOTING FROM ADELPHIA'S CASH MANAGEMENT SYSTEM

The evidence at trial showed that throughout the period of the conspiracy, Defendants took over $200 million dollars from Adelphia's Cash Management System for personal expenses ranging from $200 to purchase 100 pairs of bedroom slippers for Timothy Rigas, to over $3 million to produce a film by Ellen Rigas, to $200 million to pay off Rigas family margin loans. The missing money was obscured by the commingling of cash between Adelphia and the RMEs and the RNCEs.[12] Cash transfers for the benefit of the Rigas family needed only to be approved by a member of the Rigas family or James Brown. No promissory notes were ever signed in favor of Adelphia, and, in some instances, personal expenses were falsely recorded as Adelphia's expenses. Timothy Rigas also unilaterally changed the price allocation approved by Adelphia's Board of Directors regarding the co-purchase of certain cable systems; he shifted an extra $50 million of the purchase price from the RFEs to Adelphia without informing Adelphia's

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[12] As the district court made clear to the jury, the government did not contend that "that there [was] anything inherently wrong or unlawful with a cash management system, with a co-borrowing, or commingling." Instead, the failure to properly disclose information was the fraudulent conduct.

independent directors. The cash transfers to the Rigas family were not reported as compensation or loans, as required by the SEC, or disclosed to investors as related party transactions.

Adelphia's financial statements and annual reports did little to apprise shareholders of what the Rigas family owed Adelphia. All related party transactions between Adelphia and the Rigas family and the RNCEs were combined and "netted out" against transactions with the RMEs, which obscured what the Rigas family actually owed Adelphia.

DIBELLA'S TESTIMONY

Robert DiBella reviewed and analyzed Adelphia's accounting records from December 31, 1988 through April 30, 2002 and testified extensively about a summary chart, Government Exhibit 101, prepared with data retrieved from Adelphia's general ledger, journal entries, and other supporting documents to "summarize the affiliate receivable transactions between Adelphia and certain of the Rigas entities." He totaled the cash that flowed into the Cash Management System from the RMEs and the RNCEs and then deducted the payments made on behalf of the RMEs and the RNCEs. The result was that there were net receivables due to Adelphia from the Rigas entities of $54.9 million, $164.7 million, $10.5 million, $39.9 million, and $386 million for the years 1998 through 2002. But, the government argued, even these numbers underrepresented—by over $2.8 billion—the actual debt that the Rigas family owed Adelphia because of the debt reclassification scheme described above. The reclassification scheme was included on Government Exhibit 101, and DiBella explained to

the jury that, while the net receivable to Adelphia with the debt reclassifications was $386 million, it would have been around $3.2 billion without the reclassifications.

THE DEFENSE CASE

Timothy Rigas called no witness, and John Rigas called a character witness and two lawyers who testified that a government witness had made a prior statement that was inconsistent with his trial testimony.

THE VERDICT

After a four and a half month trial, the testimony of twenty witnesses, and the submission of hundreds of exhibits, the jury found John and Timothy Rigas guilty of conspiracy to commit securities fraud, conspiracy to make and cause to be made false statements in filings with the SEC, and conspiracy to commit bank fraud under 18 U.S.C. § 371; securities fraud under 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2; and bank fraud under 18 U.S.C. § 1344. John Rigas, Timothy Rigas, and Michael Rigas were acquitted of wire fraud and conspiracy to commit wire fraud. The jury acquitted Michael Mulcahey of all charges and acquitted Michael Rigas of the conspiracy and wire fraud counts; the jury was undecided as to the remaining counts against Michael Rigas. John Rigas and Timothy Rigas remain free on bail.

DISCUSSION

THE GOVERNMENT WAS NOT REQUIRED TO PROVE DEFENDANTS VIOLATED GAAP OR TO CALL AN ACCOUNTING EXPERT

Defendants challenge their convictions for conspiracy under 17 U.S.C. § 371 (Count One) and securities fraud under 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5; and 18 U.S.C.2 (Counts Two through Sixteen), on the grounds that the prosecution should have been required to call an accounting expert to familiarize the jury with GAAP.[13] Specifically, they contend that Financial Accounting Statement ("FAS") Number 5 ("FAS 5") by the Financial Accounting Standards Board ("FASB") applies to the Co-Borrowing Agreements that formed the basis for the securities fraud conviction, and that the government was required to introduce FAS 5 and an accounting expert to explain it.[14] We conclude that the government was not required to present this evidence.

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[13] GAAP "are the official standards adopted by the American Institute of Certified Public Accountants . . . ." *United States v. Ebbers*, 458 F.3d 110, 125 n.2 (2d Cir. 2006) (citing *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 160 n.4 (2d Cir. 2000)), *cert. denied*, 127 S. Ct. 1483 (2007).

[14] FAS 5, dealing with accounting for contingencies, reads in relevant part:

> 1. For the purpose of this Statement, a contingency is defined as an existing condition, situation, or set of circumstances involving uncertainty as to possible gain ["gain contingency"] or loss ["loss contingency"].
>
> . . .
>
> 3. When a loss contingency exists, the likelihood that the future event or events will confirm the loss or impairment of an asset or the incurrence of a liability can range from probable to remote. . . .

Defendants wisely do not argue that the prosecution was required to prove that they violated GAAP to establish that they committed securities fraud. It has been the long-held view in this Circuit that GAAP neither establishes nor shields guilt in a securities fraud case. *United States v. Simon*, 425 F.2d 796, 805-06 (2d Cir. 1969) (Friendly, J.). Making GAAP compliance determinative of securities fraud charges would require jurors to "accept the accountants' evaluation whether a given fact was material to overall fair presentation"—a proposition this Court rejected in *Simon*. *Id.* at 806. Instead, compliance with GAAP is relevant only as evidence of whether a defendant acted in good faith. *Id.* at 805.

Simon was recently, and unequivocally, reaffirmed by this Court in *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006). In *Ebbers*, we held that "GAAP may have relevance in that a defendant's good faith attempt to comply with GAAP or reliance upon an accountant's advice regarding GAAP may negate the government's claim of an intent to deceive," *id.* at 125 (citing *Simon*, 425 F.2d at 805), but that even when "improper accounting is alleged,"

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a. *Probable*. The future event or events are likely to occur.

b. *Reasonably possible*. The change of the future event or events occurring is more that remote but less than likely.

c. *Remote*. The change of the future event or events occurring is slight.

4. Examples of loss contingencies include:

. . .

h. Guarantees of indebtedness of others.

i. Obligations of commercial banks under "standby letters of credit."

. . .

we look to the statute to determine what the government must prove. *Id.*

Defendants argue that *Simon* should apply only to cases where no specific accounting provision speaks to the alleged accounting malfeasance. They base this argument on language from *Simon* that notes accountants' evaluations do not bind a jury, "at least not when the accountants' testimony was not based on specific rules or prohibitions to which they could point . . . ." *Simon*, 425 F.2d at 806. They contend that because FAS 5 applies to their situation, the district court should have required the prosecution to prove non-compliance, or, at the very least, offer expert testimony on the subject.

Defendants are wrong. The government was not required to present expert testimony about GAAP's requirements because these requirements are not essential to the securities fraud alleged here. *See Ebbers*, 458 F.3d at 125. A single reference to GAAP in the Superseding Indictment[15] does not change that conclusion, and the district court properly instructed the jury on the elements of securities fraud and conspiracy to commit securities fraud. *See United States v. Miller*, 471 U.S. 130, 144 (1985) (holding that courts may ignore "independent and unnecessary allegations in the indictments"). The jury heard testimony that the debt reclassifications were specifically designed to

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[15] Paragraph 67, related primarily to the securities fraud charge, reads as follows: "Pursuant to GAAP, Adelphia was required, among other things, to disclose the full amount of its joint and several liabilities under the Co-Borrowing Agreements in the notes accompanying its financial statements."

mislead investors about the amount of money the Rigas family and their other companies owed Adelphia, and it could have reasonably found that Defendants committed fraud. Even if Defendants complied with GAAP, a jury could have found, as the jury did here, that Defendants intentionally misled investors. Defendants reclassified debt owed under the Co-Borrowing Agreements—for which Adelphia remained jointly and severally liable—rather than paying for the securities they purchased from Adelphia in "immediately available funds." This reclassified debt also reduced the amount of money that Adelphia could borrow under the Co-Borrowing Agreements.[16] As a result, the jury could find that investors were misled into believing that Adelphia had been infused with more cash,[17] when, in reality,

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[16] In its closing argument, the government analogized a Co-Borrowing Agreement to a brother and sister obtaining a joint credit card with a $10,000 credit limit. If the brother uses a cash advance of $5,000 from the credit card to purchase a car from his sister, but does not reveal the source of the money, the sister is "not any better off for having sold [her] car to [her] brother." She is liable to the credit card company for the $5,000 used by her brother to buy the car, and her credit limit has been reduced by that $5,000.

[17] Defendants represented to this Court at oral argument that the Co-Borrowing entity that assumed the reclassified debt would not have to pay that debt until it became due. This fact undercuts Defendant's claim that the reclassification was tantamount to "immediately available funds." Even if the RMEs' assumption of this reclassified debt was, as Defendants argue, legitimate, it is clear that Adelphia was not put in the same place as it would been had the RMEs paid it, as the records erroneously reflected, with immediately available funds. The reclassified debts were not immediately due; any assumption of repayment freed up no new funds for Adelphia but, in Defendants' best argument, made the RMEs the primary obligor when that debt came due, sometime in the future.

debt for which Adelphia remained jointly and severally liable was moved onto the RMEs' books. Whether the reclassification was permitted under GAAP was not the issue.

In *Ebbers*, we also foreclosed Defendants' argument that the court should have required the prosecution to call expert witnesses to testify regarding GAAP and, specifically, FAS 5: "The government is not required in addition to prevail in a battle of expert witnesses over the application of individual GAAP rules." 458 F.3d at 125-26. While Defendants are correct that the district court opined that an expert might be helpful, the prosecution apparently thought it could explain the alleged fraud through the testimony of other witnesses—including James Brown, Adelphia's former Vice President of Finance, and James Helms, an accountant/manager in Adelphia's treasury department—with sufficient clarity to garner a conviction. The district court did not err by not requiring the prosecution to call accounting experts.

Finally, in a letter submitted pursuant to Federal Rule of Appellate Procedure 28(j), Defendants contend that *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007), supports their argument. The defendants in *Lake* were indicted for, *inter alia*, filing false 10K reports with the SEC because those reports failed to disclose the value of their personal use of corporate aircraft. *Id.* at 1253-54. "Highly pertinent" to the jury's assessment of whether the *Lake* defendants acted with wrongful intent in failing to disclose their use of the company planes was "whether the personal use had to be reported to the SEC." *Id.* at 1253. The SEC required disclosure only if the "aggregate incremental cost" exceeded a

certain threshold. *Id.* Because the government did not show that the SEC required disclosure of the aircraft use, there was no "evidence from which the jury could infer beyond a reasonable doubt that any of the reports wired to the SEC was false, fraudulent, or even misleading." *Id.* at 1258, 1260.

Defendants argue that *Lake*'s endorsement of the SEC standards for disclosure compels us to find that the government should have provided GAAP disclosure standards here. GAAP rules do not govern whether Adelphia's disclosures regarding the Co-Borrowing Agreements were false and fraudulent, and a violation of GAAP is not an element of the offenses charged. Because Defendants' guilt does not turn on whether Adelphia's accounting statements complied with GAAP, *Lake* is inapposite.

DIBELLA DID NOT PRESENT EXPERT OPINION TESTIMONY

Defendants assert that government witness Robert DiBella improperly offered expert opinion testimony. In our view, DiBella's testimony was properly admitted.

A district court's decision to admit evidence is reviewed for abuse of discretion. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 174 n. 1 (1997); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005). Even if evidence is improperly admitted, reversal is warranted only if an error affects a "substantial right," Fed. R. Evid. 103(a)—that is, if the error had a "substantial and injurious effect or influence" on the jury's verdict. *United States v. Dukagjini*, 326 F.3d 45, 62 (2d Cir. 2003) (internal quotation marks omitted); *see also United States v. Grinage*, 390 F.3d 746, 751 (2d Cir. 2004); *Bank of*

China, New York Branch, v. NBM LLC, 359 F.3d 171, 183 (2d Cir. 2004). "Where the erroneously admitted evidence goes to the heart of the case against the defendant, and the other evidence against the defendant is weak, we cannot conclude that the evidence was unimportant or was not a substantial factor in the jury's verdict." *Grinage*, 390 F.3d at 751 (citing *Wray v. Johnson*, 202 F.3d 515, 524-30 (2d Cir. 2000); *United States v. Forrester*, 60 F.3d 52, 64-65 (2d Cir. 1995)).

The government did not present DiBella as an expert witness.[18] Instead, the government informed the district court that DiBella would be testifying only to Adelphia's accounting records and not regarding "the appropriateness of [the] accounting treatment." Noting the "overwhelming complexity of the case," the court asked counsel, "[h]ave you ever seen a case in which a summing up was more appropriate than this one?" Over Defendants' objection, the court accepted the government's representation of DiBella's testimony as that of "someone who has gone through the books and records and will testify to what the books and records reflect," and permitted DiBella to testify as a fact witness. The court added that it would "revisit" its decision "if the government's representation[,] inadvertently or otherwise[,] is not what the testimony of this witness will be . . . ." Defendants later objected that several lines of questioning impermissibly invoked expert testimony; the district court allowed DiBella to continue.

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[18] The government did not attempt to satisfy the reliability requirements set forth in Federal Rule of Evidence 702 or disclose DiBella as an expert pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G).

It is undisputed that DiBella had personal knowledge of Adelphia's books. Tatum Partners, the company for which DiBella worked, was retained by Adelphia in August 2002, after Defendants were indicted, "to assist in the restatement or correction of Adelphia financial statements." DiBella began working as a full-time Adelphia employee in September 2002. In the course of nearly twenty months at Adelphia, DiBella developed what he characterized as "fairly extensive knowledge of the debt area of Adelphia" by reviewing the Co-Borrowing Agreements, and other documents within the company, focusing on "several of the areas of related-party transactions with the Rigas family, including security purchases, margin loans, other transactions." He also familiarized himself with Adelphia's accounting system and the software used to generate reports. Using data collected by Adelphia's accounting system, DiBella created Government Exhibit 101, a chart that summarized the affiliate receivable transactions between Adelphia and certain Rigas entities from 1999 through April 2002.

DiBella testified, using Government Exhibit 101, about co-borrowing debt transferred from Adelphia's books to the ledgers of the RFEs. Brown had already testified that the purpose of the reclassifications was to mask the amount of money that the RFEs owed Adelphia. DiBella explained that these reclassifications involved (1) the reduction of debt in Adelphia's balance sheets; (2) a corresponding reduction in the amount owed to Adelphia by an RFE; and (3) the creation of a payable to the RFE from an Adelphia subsidiary. DiBella testified that Adelphia's net related-party receivable balance would have been $2.8 billion

higher without the debt reclassifications, for a total of around $3.2 billion.

Defendants' cross-examination attempted to show that the reclassifications were legitimate, and that the RFEs owed the reclassified $2.8 billion to the banks—not to Adelphia. On redirect, DiBella noted that the debt reclassification "really shouldn't have occurred [because] Adelphia's still responsible for that debt." In its final redirect question, the government asked DiBella how much, "[b]ased on [his] review of the records and the analysis," the RFEs owed Adelphia. DiBella's answer—"$3.2 billion."

Defendants contend that DiBella gave expert opinion testimony about what Adelphia's books should have shown. They argue that the government "concealed from the court, the defense, and . . . the jury" that this was opinion, not fact, testimony. In support of this argument, Defendants point to DiBella's deposition testimony in a subsequent Adelphia-related civil case. In mid-February 2005, DiBella testified that the receivable balance on Adelphia's books did not include the $2.8 billion of reclassified debt, but indicated that, based on a "review of accounting literature," it was "quite clear that Adelphia had no basis to relieve the debt from its balance sheet." When asked to name the accounting literature he had reviewed, DiBella said that he considered FAS 140.[19]

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[19] Defendants also argue that DiBella's testimony regarding Adelphia's books was, as a matter of fact, incorrect, because the Restatement of Suretyship and Guaranty recognizes that while the *bank* has the right to collect from either co-borrower on a loan that provides for joint and several liability if the loan is

Defendants also argue that the prosecutor "misrepresent[ed]" to the district court that DiBella would merely be a summary witness; this "deceit," Defendants opine, was tantamount to a "foul blow that violated the prosecution's fundamental obligation to see that justice is done." *See Berger v. United States*, 295 U.S. 78, 88 (1935).

The government contends that DiBella did not offer expert testimony because he merely "d[id] the math" to explain how the reclassifications that Brown indicated were fraudulent affected Adelphia's ledger. The government also argues that DiBella's subsequent deposition testimony that the debt reclassification entries were improper under the relevant accounting literature does not transform his testimony in the Rigas trial into the product of accounting analysis.

Did DiBella offer impermissible expert testimony? If his testimony "result[ed] from a process of reasoning familiar in everyday life," it was permissible lay opinion testimony under Rule 701.[20]

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overdue, the borrowing parties may themselves have an understanding as to which one must repay the money. Restatement (Third) of Suretyship and Guaranty § 1 cmt. p (1996). Defendants do not contend that they made this argument to the district court, and we did not find it in our review of the record; we decline to address it for the first time on appeal.

20 Federal Rule of Evidence 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c)

Fed. R. Evid. 701, advisory committee's note to 2000 amend. (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)). A witness's specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony "expert" as long as it was based on his "investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise . . . ." *Bank of China*, 359 F.3d at 181. If, however, the witness's testimony was "not a product of his investigation, but rather reflected [his] specialized knowledge," then it was impermissible expert testimony. *Id.* at 182. In particular, Rule 701(c), which prohibits testimony from a lay witness that is "based on scientific, technical, or other specialized knowledge," is intended "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 advisory committee's note to 2000 amend.; *see also Bank of China*, 359 F.3d at 181.

The district court did not abuse its discretion in permitting DiBella to testify under Rule 701 about the effects of the disputed reclassifications. *Garcia*, 413 F.3d at 210. First, DiBella's testimony was based upon his observations during his twenty months as an Adelphia employee. Fed. R. Evid. 701(a). DiBella was responsible for correcting Adelphia's financial statements and was well-acquainted with the records of Adelphia and the RFEs. While Defendants argue that DiBella's opinion was based on what *Adelphia*'s records *should*

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not based on scientific, technical, or other specialized knowledge. . . .

have shown, DiBella's testimony was based upon Adelphia's and the RFEs' records, and addressed the aggregate of what the RFEs would actually owe Adelphia if the debt reclassifications, which Brown and others testified were fraudulent, had not occurred.

Second, DiBella's opinion about the effects of the reclassifications was "helpful to . . . the determination of a fact in issue . . . ." Fed. R. Evid. 701(b). As the district court noted, testimony that summed up the government's allegations was quite "appropriate" in this complicated case. DiBella's testimony about both the undisputed $386 million and the reclassified $2.8 billion helped explain how the allegedly improper reclassification affected what the RFEs owed Adelphia.

Third, DiBella's opinion about the reclassifications was "not based on . . . specialized knowledge," because he presumed that the reclassifications were shams, as Brown and others testified, and then explained how the reclassifications affected the amount the RFEs owed Adelphia. Fed. R. Evid. 701(c). Whether these reclassifications should have been carried on Adelphia's books, as a matter of appropriate accounting techniques, was a separate issue. While DiBella did testify briefly on redirect that moving the reclassifications to the RFEs' books was improper, the remainder of his testimony regarding the reclassifications related to how the reclassifications affected the amount the RFEs actually owed Adelphia. DiBella's deposition testimony in a later case that FAS 140 required the debt reclassifications to be recorded on Adelphia's books does not compel

the conclusion that his testimony here was impermissible expert opinion.

Finally, even if portions of DiBella's redirect testimony were admitted in error, this error was harmless. Defendants have not shown that this testimony had a "substantial and injurious effect or influence" on the jury's verdict. *Dukagjini*, 326 F.3d at 62; *see also Bank of China*, 359 F.3d at 183. We are confident that, given the importance of any wrongly admitted testimony and the overall strength of the government's case, "the error did not influence the jury, or had but very slight effect." **Dukagjini**, 326 F.3d at 62 (citation omitted).

BANK FRAUD CONVICTIONS: THE INDICTMENT WAS NOT CONSTRUCTIVELY AMENDED, BUT THE CONVICTION ON COUNT TWENTY-THREE MUST BE REVERSED ON SUFFICIENCY GROUNDS

Defendants challenge their bank fraud convictions (Counts Twenty-Two and Twenty-Three) on two grounds: first, that the bank fraud charges were constructively amended, and second, that the evidence submitted at trial was insufficient to prove either the charged bank fraud or the constructively amended bank fraud.[21] We conclude that the Superseding Indictment was not constructively amended, but that the government proffered insufficient evidence to prove that the misrepresentations alleged in Count Twenty-Three

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[21] Defendants made both of these arguments in post-trial motions before the district court, and were unsuccessful. *See United States v. Rigas*, No. 02-1236-cr (LBS), 2004 WL 2601084 (S.D.N.Y. Nov. 15, 2004).

were material. We affirm Defendants' convictions on Count Twenty-Two, but reverse their convictions on Count Twenty-Three on sufficiency grounds and instruct the district court to enter a judgment of acquittal on that Count.

VI. CONSTRUCTIVE AMENDMENT

Defendants argue that the government's proof at trial constituted a constructive amendment of the indictment. An indictment has been constructively amended "[w]hen the trial evidence or the jury charge operates to 'broaden[] the possible bases for conviction from that which appeared in the indictment.'" *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (second alteration in original) (quoting *United States v. Miller*, 471 U.S. 130, 138 (1985)); *see also United States v. Kaplan*, __ F. 3d __, No. 05-5531-cr, 2007 WL 1087270, at *16 (2d Cir. Apr. 11, 2007). We exercise *de novo* review of a constructive amendment challenge, *United States v. Wallace*, 59 F.3d 333, 336 (2d Cir. 1995), which is a *per se* violation of the Grand Jury clause of the Fifth Amendment[22] requiring reversal. *United States v. Roshko*, 969 F.2d 1, 5 (2d Cir. 1992) (explaining that, where constructive amendment "affects an essential element of the offense," it "destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury" (alteration in original) (internal quotation marks omitted)); *see also Milstein*, 401 F.3d at 65.

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[22] The Grand Jury Clause provides "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ." U.S. Const. amend. V, cl. 1.

Alternatively, "'[a] variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.'" *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir. 2003) (quoting *United States v. Frank*, 156 F.3d 332, 337 n.5 (2d Cir. 1998)). A defendant alleging variance must show "substantial prejudice" to warrant reversal. *United States v. McDermott*, 918 F.2d 319, 326 (2d Cir. 1990); *see also* Fed. R. Crim. P. 52(a); *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006).

Section IV of the Superseding Indictment explained, at paragraphs 159 and 161, that Co-Borrowing Agreements required "quarterly reports to . . . lenders regarding each borrowing group's compliance with the conditions of the credit facilities, and, in particular, [the borrowing group's] ratio of cash flow to indebtedness." [23] The indictment further alleged, at paragraph 160, that Timothy Rigas and Mulcahey, along with other Adelphia employees, "prepared and submitted to lenders loan compliance reports that fraudulently misrepresented, among other things, the cash flow of the reporting entities." If a borrowing group was not in compliance with its loan covenants, or if it could obtain a better interest rate by reporting a more favorable ratio of cash flow to indebtedness, paragraph 162 alleged, Timothy Rigas and Mulcahey, together with other Adelphia employees, "routinely made one or more fraudulent adjustments to the financial information disclosed in the required loan compliance documents." Finally, paragraph 163 stated:

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[23] *See* discussion *supra* page 6.

> Such fraudulent adjustments to financial information submitted to the banks took a number of forms. Often, TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, would record revenue due from affiliates, without any factual basis, and direct Adelphia employees to credit such revenue to a particular borrowing group so that it would be in compliance. At other times, TIMOTHY J. RIGAS and MULCAHEY would direct Adelphia employees either to lower the borrowing group's actual costs or increase its extra revenues, again with no factual basis. Such fraudulent adjustments had the effect of increasing the cash flow for a particular borrowing group so as to bring it into compliance with its loan agreements.

The charging paragraphs for Counts Twenty-Two and Twenty-Three—paragraphs 210-11—incorporated by reference the allegations contained in paragraphs 1-197[24] and 204-05,[25] and alleged that John Rigas, Timothy Rigas, Michael Rigas, and Mulcahey committed bank fraud by "falsely represent[ing] that the borrowers on [two] credit agreements . . . were in compliance with certain material terms of those credit agreements."

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[24] Paragraphs 123-26, for example, included the allegations that Defendants manipulated Adelphia's EBITDA by entering into marketing support agreements with two companies, which were identified at trial as Scientific Atlanta and Motorola.

[25] Paragraphs 204-05 described the means and methods Defendants employed to carry out the charged conspiracy.

The Superseding Indictment briefly described, and set forth the approximate dates of, the two Co-Borrowing Agreements.

Defendants contend the only bank fraud theory properly set forth in the Superseding Indictment was that "post-closing adjustments" to financial information resulted in bank fraud. They argue that their convictions were based on an entirely different theory, referenced only in Section II of the indictment, that related to the EBITDA manipulations from marketing support contracts with Motorola and Scientific Atlanta. They argue that the jury should not have been permitted to consider any conduct or scheme other than the one specifically alleged in Section IV of the Superseding Indictment.

The government argues that the Superseding Indictment was sufficiently broad for the jury to consider whether the fraudulent EBITDA manipulations from the marketing support contracts "trickled down" to affect the leverage ratios reported in compliance reports to the banks. The government contends the indictment did not limit it to proving only that post-closing adjustments and management fee forgiveness affected the leverage ratios that were submitted to the banks. The government also notes that the Superseding Indictment alleged that the Defendants "prepared and submitted to lenders loan compliance reports that fraudulently misrepresented, *among other things*, the cash flow of the reporting entities" and "falsely represented that the borrowers on the credit agreements set forth below were in compliance with certain material terms of those credit agreements." Moreover, the Superseding Indictment alleged that

Defendants "caused Adelphia to engage in sham transactions with affiliates for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports" and "caused Adelphia to record false and misleading entries in its books and records for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports."[26] The Superseding Indictment also alleged that Defendants "caused Adelphia to submit false and misleading compliance reports, and to make other false and misleading statements, to banks and holders of Adelphia's corporate debt." Because the Superseding Indictment was sufficiently broad, the government argues, the sham marketing support transactions with Motorola and Scientific Atlanta, along with journal entries which booked non-existent fee income from certain RMEs and RNCEs, permissibly demonstrated the means by which Defendants caused Adelphia to engage in sham transactions "for the purpose of substantiating the fraudulent loan compliance reports."

To establish a constructive amendment, the Rigases must show that trial evidence or the jury instructions "so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *Salmonese*, 352 F.3d at 620 (internal quotation marks omitted). "[W]here a generally framed indictment encompasses the specific legal theory or evidence used at trial," there is no constructive amendment. *Milstein*, 401

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[26] These allegations are in the section of the Superseding Indictment relating to the "means and methods by which [Defendants] . . . would and did carry out the conspiracy," which was incorporated by reference by the charging paragraphs.

F.3d at 65 (quoting *Salmonese*, 352 F.3d at 620). As a result, "an indictment drawn in more general terms may support a conviction on alternate bases, even though an indictment with specific charging terms will not." *United States v. Zingaro*, 858 F.2d 94, 99 (2d Cir. 1988).

Our constructive amendment jurisprudence has resulted in what we recently characterized as apparently "divergent results." *Milstein*, 401 F.3d 65 (collecting cases). One constant, however, is that we have "consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality*[27] to be proven at trial." *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992) (emphasis added) (internal quotation marks omitted). "[P]roof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983). However, "even an amendment or a variance that does not alter an essential element may still deprive a defendant of an

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[27] *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 181-182 (2d Cir. 2002); *Salmonese*, 352 F.3d at 620-22 (fraud conspiracy; "core criminality" was fraud scheme of selling stripped warrants, and proof of unalleged sales was not a constructive amendment); *United States v. Danielson*, 199 F.3d 666, 669 (2d Cir. 1999) (firearm possession charge; because defendant had notice of "core of criminality," government was permitted to present theory that shells, rather than entire rounds, had traveled in interstate commerce); *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir. 1997) (conspiracy to possess with intent to distribute controlled substances; where indictment alleged cocaine and methamphetamine, instruction to permit conviction on basis of marijuana transaction was a constructive amendment because defendant "was not given notice of the core criminality to be proven at trial").

opportunity to meet the prosecutor's case." *United States v. Helmsley*, 941 F.2d 71, 90 (2d Cir. 1991).

The Supreme Court recently reiterated the "two constitutional requirements for an indictment: first, that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, that it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Resendiz-Ponce*, 127 S.Ct. 782, 788 (2007) (internal alterations and quotation marks omitted). The issue in determining whether an indictment has been constructively amended, then, is whether the deviation between the facts alleged in the indictment and the proof adduced at trial undercuts these constitutional requirements. If the indictment notifies the defendant of the "core of criminality," *Patino*, 962 F.2d at 265-66, and the government's proof at trial does not "modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury," *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir. 1994), then he has sufficient notice "of the charge against which he must defend," *Resendiz-Ponce*, 127 S.Ct. at 788.

We recently affirmed a conviction for wire fraud where the only wire transfer actually alleged in the indictment was not proven. *Dupre*, 462 F.3d at 140-141. There was no constructive amendment, we held, "because the evidence at trial concerned the same elaborate scheme to defraud investors as was described in the indictment," even though none of the wire transfers presented in the trial had been alleged in the indictment. *Id.* The indictment and the

evidence at trial contained the same starting and ending dates of the conspiracy, and the prosecution demonstrated the same overall scheme—that defendants misled investors into believing that they would eventually be able to obtain certain funds belonging to family members of former Philippine president Ferdinand Marcos. *Id.* at 141. The discrepancy between the wire transfer alleged in the indictment and the transfers proven at trial constituted a non-prejudicial variance; we affirmed the conviction. *Id.* at 141-42.

In *Milstein*, the indictment alleged that pharmaceuticals were "misbranded" because the "[f]orgery or falsification of any part of the packaging material, including the instructional inserts, lot numbers or expiration dates, renders the drug misbranded under federal law." 401 F.3d at 64 (alteration in original). We found that, by charging him with misbranding because he had "re-packaged drugs as if they were the original product from the licensed manufacturers," the government had "not necessarily place[d] Milstein on notice" that it would also attempt to prove that the drugs were unsterile.[28] *Id.* at 65. Thus, we were persuaded that the indictment was constructively amended and reversed on that count. *Id.*

Defendants' case lies somewhere between *Dupre* and *Milstein*. Here we must determine

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[28] We also noted that there were twenty different methods of misbranding at the time of Milstein's offense. *Milstein*, 401 F.3d at 65 (citing 21 U.S.C. § 352(a)-(t) (1994) (describing ways in which one could misbrand drugs), amended by, inter alia, Food and Drug Administrative Modernization Act of 1997, Pub. L. No. 105-115, Title I, §§ 125, 126 (repealing 21 U.S.C. §§ 352(d), 352(k), 352(l)).

whether permitting the jury to consider the trickle-down effects of the marketing support agreements with Motorola and Scientific Atlanta constituted a constructive amendment of the indictment. The issue, then, is whether the Superseding Indictment put Defendants on notice that the jury might consider these EBITDA manipulations. *See, e.g., Resendiz-Ponce*, 127 S.Ct. at 788. While Paragraph 163 appears to limit the manner in which the government planned to prove bank fraud, it is not the only paragraph in the indictment that addresses bank fraud. The government's argument that there was no constructive amendment finds support in other paragraphs that suggest that the specific allegations of bank fraud are merely exemplary. Furthermore, the charging paragraphs for bank fraud incorporate by reference Paragraph 204, which alleges broadly that "[D]efendants and their co-conspirators caused Adelphia to record false and misleading entries in its books and records for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports."

When the crime charged involves making false statements, "the 'core of criminality' is not the substance of the false statements but rather that knowing falsehoods were submitted . . . ." *United States v. Sindona*, 636 F.2d 792, 797 (2d Cir. 1980) (citing *United States v. Bernstein*, 533 F.2d 775 (2d Cir. 1976)). In our opinion, Defendants were notified of the "core of criminality" the government intended to prove. *Patino*, 962 F.2d at 265-66. Furthermore, we must read an indictment "to include facts which are necessarily implied by the specific allegations made." *United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002) (internal

quotation marks omitted). The Superseding Indictment explained that the sham transactions "g[a]ve the false appearance of revenue to Adelphia," and this sham increase in revenue artificially inflated Adelphia's EBITDA. Adelphia was merely a holding company—any borrowing was done through its subsidiaries or, as through the Co-Borrowing Agreements, combinations of its subsidiaries and certain RFEs. The leverage ratios reported to the banks under the Co-Borrowing Agreements were, roughly, debt divided by cash flow. An increase in revenue from the sham transactions increased the subsidiaries' cash flow, artificially decreasing the leverage ratios they reported to the banks. The Co-Borrowing Agreements linked interest rates to the leverage ratios and provided that leverage ratios above a certain level were an event of default; manipulating the leverage ratios could, therefore, artificially lower interest rates or present the false appearance that the subsidiaries complied with the conditions of the Agreements.

Defendants therefore had notice that the government would seek to prove that they "caused Adelphia to record false and misleading entries in its books and records for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports" and that the government would introduce evidence about the sham marketing support agreements that resulted in an artificial increase in revenue. That this increase in revenue would contribute to the false and fraudulent loan compliance report is "necessarily implied by the specific allegations made." *LaSpina*, 299 F.3d at 177; *see Dupre*, 462 F.3d at 140-141.

Our holding also comports with *Sindona*. In *Sindona*, we held that where, in response to a request for a bill of particulars, the government referred defense counsel to certain counts of an indictment—counts that had, incidentally, been dismissed—the defendant had "notice that the core of the crime charged was the concealment of the source of the funds and not the illegality of the fiduciary system" used to conceal those funds. 636 F.2d at 797. We found that there was no constructive amendment, and that the defendant's claim on appeal that he was "surprised by the 'shift' of the [g]overnment late in the trial" was, if anything, non-prejudicial variance. *Id.* at 797-98. Here, likewise, the fact that the jury was permitted to consider proof of the trickle-down EBITDA manipulation in determining whether Defendants were guilty of bank fraud would, at most, constitute a variance. While Defendants' brief contains, in a footnote, a cursory allegation of prejudice, they have not shown the "substantial prejudice" required to warrant reversal on variance grounds. *McDermott*, 918 F.2d at 326; Fed. R. Crim. P. 52(a). Defendants' claim that evidence presented at trial constituted a constructive amendment, or prejudicial variance, of the Superseding Indictment thus fails.

VII. SUFFICIENCY

A defendant challenging the sufficiency of the evidence "bears a heavy burden." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (quoting *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001)). Sufficiency analysis requires a court to review the separate "[p]ieces of evidence . . . not in isolation but in conjunction," *United States v. Miller*, 116 F.3d 641, 676 (2d Cir. 1997), and to draw all

reasonable inferences in the light most favorable to both the jury's verdict, *United States v. Stavroulakis*, 952 F.2d 686, 695 (2d Cir. 1992), and the government, *United States v. Moore*, 208 F.3d 411, 413 (2d Cir. 2000). If "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," we must affirm the conviction. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

> The federal bank fraud statute criminalizes:
>
> knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises . . .

18 U.S.C. § 1344.

"[T]he 'scheme to defraud' clause . . . requires that the defendant engage in . . . a pattern or course of conduct designed to deceive a federally chartered or insured financial institution into releasing property, with the intent to victimize the institution by exposing it to actual or potential loss." *Stavroulakis*, 952 F.2d at 694. First, the government must prove that the defendant engaged in a deceptive course of conduct by making material

misrepresentations.[29] *Neder v. United States*, 527 U.S. 1, 16 (1999); *United States v. Rodriguez*, 140 F.3d 163, 167-68 (2d Cir. 1998). "A false statement is material if it has a 'natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Whab*, 355 F.3d 155, 163 (2d Cir. 2004) (quoting *Neder*, 527 U.S. at 16). We have also held that "[t]o be material, the information withheld either must be of some independent value or must bear on the ultimate value of the transaction." *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000) (quoting *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994)). Analysis of the misrepresentations must be in the context in which they were made. *See, e.g., Weinstock v. United States*, 231 F.2d 699, 702 (D.C. Cir. 1956) ("Materiality must be judged by the facts and circumstances in the particular case.").

Second, the government must prove that the defendant, through the scheme, intended to victimize the bank by exposing it to loss. *United States v. Barrett*, 178 F.3d 643, 647-48 (2d Cir. 1999). "[A]ctual or potential loss to the bank is not an element of the crime of bank fraud but merely a

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[29] Although a statement's materiality may present a question of law resolvable by an appellate court in some contexts, *see, e.g., Kungys v. United States*, 485 U.S. 759, 772 (1988); *United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998), a criminal defendant is entitled to have a jury determine his guilt on every element of his alleged crime and the jury must pass on the materiality of a defendant's misrepresentations. *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995). Accordingly, we will not consider in the first instance arguments regarding materiality that were not presented to the jury.

description of the required criminal intent."[30] *Id.* at 648.

Defendants argue that the government did not prove that misrepresentations made to the banks were material. Defendants rely on *FDIC v. W.R. Grace & Company*, 877 F.2d 614, 620 (7th Cir. 1989), a Seventh Circuit civil bank fraud case, for the proposition that, in Defendants' words, a false statement to a bank is "material only if it was capable of affecting a decision that the bank was entitled to make under the loan agreement." Specifically, they contend that the government should have been required to prove that the trickle-down effect of the marketing support agreements resulted in a fraudulent leverage ratio that caused the bank to receive less interest than it would have under the actual leverage ratio.

James Brown testified that, in the 1990s, he, Timothy Rigas, Michael Mulcahey, and others would meet quarterly to discuss the leverage ratios of the subsidiaries in the borrowing group and compare them to the leverage ratios required by the Co-Borrowing Agreements. Brown testified that the marketing support manipulations that were intended to improve Adelphia's EBITDA also "impacted the subsidiaries in the borrowing groups" by "caus[ing] the leverage ratio to appear lower than it really was because the EBITDA number was overstated." The government asked, "what effect could that have on the interest rate those affiliates and subsidiaries paid?" Brown responded, "[t]he

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[30] Defendants do not contest that the government proved a scheme to defraud the banks.

banks would get less interest payments than they had bargained for."

Brown also testified that if the co-borrowing subsidiaries' leverage ratios were still "out of compliance" with "what was required in the loan agreements," he, Timothy Rigas, and others "would make other types of manipulations of either arbitrarily moving expenses between companies or adding invented affiliate income or interest income from one internal company to another." While Brown was personally involved with these manipulations only during an earlier period not covered by the indictment, he opined that they continued into 2000 and 2001 because he had "reviewed documents that make it pretty clear, and had conversations with people while I worked there that were consistent with what I saw in the documents."

Mulcahey testified that each Co-Borrowing Agreement tied the interest rate of a loan to a range of leverage ratios; changes in the leverage ratios within the range did not alter the interest rate. Mulcahey noted that reducing management fees paid by a borrowing group would increase the cash flow in that borrowing group and reduce the leverage ratio. But the interest rate paid to the bank was not reduced until the decrease was large enough to "cross the threshold" into another interest rate. Mulcahey testified that $6 million in management fees were reduced from the CCH Co-Borrowing Group in 2001 to "put the borrowing group in a better position as far as the [interest] on the agreement."[31] Mulcahey

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[31] Mulcahey also testified that leverage ratio manipulations lowered the interest rate the UCA Co-Borrowing Group paid to the banks; however, the government did not charge the

did not identify any OCH manipulations that were intended, or sufficient, to cross the threshold into a different interest rate.[32]

In support of Count Twenty-Two, which alleges Defendants committed bank fraud from approximately April 14, 2000 through May 2002 using the OCH Co-Borrowing Agreement, the government submitted the loan agreement itself, a compliance certificate submitted to the banks for the quarter ending June 30, 2001, and several pages of typed and handwritten notes relating to "CCH compliance." The "CCH compliance" notes contained a page dated October 1, 2001, with this handwritten comment: "Leverage is 5.01—I think Mike would want it to be less than 5.00 to get interest savings—talk to M [illegible]." The leverage ratio the CCH Borrowing Group later reported to the banks for that period was 4.98. Another note relating to the CCH facility included this handwritten comment: "Reduce mgt fees to prior period levels to improve leverage ratios and pro forma debt." An arrow was drawn from that statement to another, which directed—in what Mulcahey identified as his handwriting—"Please reduce management fees by 6MM." The CCH Co-Borrowing Agreement provides that the interest rates on the revolving credit facilities increase at leverage ratios of 4.75 and then again at 5.25, and that the interest rates on the term credit facilities increase if they are above 5.0.

Defendants with bank fraud with regard to the UCA Co-Borrowing Group.

[32] See *supra* footnote 9 regarding the CCH and OCH Co-Borrowing Groups.

In support of Count Twenty-Three, which alleges Defendants committed bank fraud from approximately September 28, 2001 through May 2002 using the OCH Co-Borrowing Agreement, the government submitted the loan agreement and a Borrowing Notice, dated October 22, 2001, that requested a Revolving Loan of over $423 million.[33] The Borrowing Notice incorporates by reference the terms of the OCH Co-Borrowing Agreement and makes several statements, including the following: "All of the representations and warranties of any Company set forth in the Loan Documents are true and correct in all material respects . . ." and "No Default or Potential Default has occurred and is continuing or will arise after giving effect to the requested Borrowing."

In its closing statement, the government told the jury that

> the indictment charges, and we've shown you, that these defendants on behalf of Adelphia[,] and in particular Mike Mulcahey[,] filed loan compliance certifications with Adelphia's banks that lied, that lied about the true leverage ratio of Adelphia's borrowing groups, and it lied about the true leverage ratio by inflating the EBITDA that was used to calculate it and by misleadingly taking out expenses that should have lowered the EBITDA, like the management fees you've heard about.

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[33] The government submitted no compliance certificates.

The government argued that the manipulations were

> done to change the leverage ratio that was shown to the banks, to fool the banks about what the real leverage ratio was. And you learned that that harmed the banks, because the banks got paid less interest from these manipulations. The lower the leverage ratio, the less interest Adelphia paid, and the less interest the Rigas family paid on the co-borrowings.
>
> And so when Adelphia lied to the banks about having a lower leverage ratio, they got to pay the banks unfairly low interest. That's the gravamen, that's the base, of the co-borrowing bank fraud. And Count Twenty-Two charges the CCH facility, and County Twenty-Three charges the OCH facility.

The court instructed the jury on bank fraud. While Defendants do not appeal the jury instructions, they are summarized in the margin.[34]

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[34] In the substantive bank fraud instruction, the court read the indictment, which alleged that "[D]efendants falsely represented that the borrowers on the credit agreements [in Counts Twenty-Two and Twenty-Three] . . . were in compliance with certain material terms of those credit agreements." The court explained that to establish a violation of the bank fraud statute, the government would have to prove beyond a reasonable doubt that each Defendant "executed a scheme or artifice to defraud a bank, or . . . to obtain money owned by or under the custody or control of the bank, by means of materially false or fraudulent pretenses, representations, or promises; to wit, that the defendant falsely represented that the borrowers on the credit agreements set forth in Counts [Twenty-Two] and [Twenty-Three] were in compliance with certain material terms

The testimony of Brown and Mulcahey certainly support the "intent" element of bank fraud. But proving a scheme does not prove that Defendants' misrepresentations were material. *See, e.g., United States v. Williams*, 12 F.3d 452, 456 (5th Cir. 1994), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482 (1997). In *Neder*, the Supreme Court rejected the idea that a bank fraud conviction could stand "so long as the defendant *intended* to deceive the victim, even if the particular means chosen turn out to be immaterial, *i.e.*, incapable of influencing the intended victim." *Neder*, 527 U.S. at 24.

This is a rather unusual bank fraud case; most bank fraud is committed when a defendant makes a misrepresentation to a bank in an effort to persuade the bank to make a discretionary decision in a way that benefits him. It is clear that any number of misrepresentations made by an applicant for a loan are or can be "material." The bank's subjective decision may be influenced by many variables, including inaccurate leverage ratios. *See, e.g., United States v. Pribble*, 127 F.3d 583, 591 (7th Cir. 1997); *United States. v. Coffman*, 94 F.3d 330, 333

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of those agreements." The court also instructed the jury that the government had to prove Defendants' intent to defraud and that the banks were federally chartered or insured financial institutions.

In its instructions for bank fraud conspiracy, the district court informed the jury that Defendants were "charged with agreeing to execute a scheme to defraud one or more banks by filing false and misleading compliance reports regarding its loans." The court also explained that "[t]he false or fraudulent representation must relate to a material fact or matter . . . . [A] material fact is one that a reasonable person would have considered important in making a decision."

(7th Cir. 1996). The bank fraud case the government presented to the jury involved misrepresentations intended to yield interest savings—but the Co-Borrowing Agreements constrained the bank's "discretion" [35] to charge different interest rates. The Co-Borrowing Agreements did require that the information submitted be accurate "in all material respects"—but this leaves unanswered the question of what, exactly, was "material." The simple fact that the Co-Borrowing Agreements required information does not make any misstatement of that information *per se* material. *Cf. Rodriguez*, 140 F.3d at 168.

Defendants' misrepresentations certainly concerned a variable that mattered to the banks; the leverage ratio was clearly relevant information. But "relevance" and "materiality" are not synonymous. In Weinstock, the D.C. Circuit explained the a distinction between materiality and relevance: "To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made." 231 F.2d at 701. We find *Weinstock* persuasive: While the leverage ratio here is certainly relevant, Defendants' misrepresentations were material only if they tended to affect interest rates. *See also Coffman*, 94 F.3d at 335 (distinguishing between relevant

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[35] Referring to the bank's discretion to charge a different interest rate is not an entirely accurate description of what actually occurred under the Co-Borrowing Agreements. A leverage ratio above 5.0 on the CCH Co-Borrowing Agreement, for example, would automatically require the co-borrowers to pay a higher interest rate on the term loan component than one that was below 5.0.

misrepresentations that are material and "mere puffery").

Misrepresentations that are "material" in the context of "an objective decisionmaking process" would tend to be quite different from misrepresentations that are material in subjective decisions such as "the decision to enter a contract or to do some act in detrimental reliance on the assertion of another." *Kungys v. United States*, 485 U.S. 759, 787 (1988) (Stevens, J., concurring in the judgment, joined by Marshall & Blackmun, JJ.).[36] In the context of an objective decisionmaking process, whether a misrepresentation is "material" requires examination of the factors the decisionmaker would employ, and the degree to which a misrepresentation would be "capable of influencing[] the decision of the decisionmaking body." *Neder*, 527 U.S. at 16. If a bank's discretion is limited by an agreement, we must look to the agreement to determine what factors are relevant, and when a misstatement becomes material. *See W.R. Grace & Co.*, 877 F.2d at 620.

The government offered sufficient evidence to show that Defendants made misstatements about the leverage ratios. For those misstatements to be material, however, they had to be capable of influencing a decision that the bank was able to

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[36] Although *Kungys* involved the materiality requirement of misrepresentations in the context of denaturalization proceedings under the Immigration and Naturalization Act of 1952, § 340(a), 66 Stat. 260, as amended, 8 U.S.C. § 145 1(a), we have described *Kungys* as addressing "the same uniform definition of 'material' that is typically used in interpreting criminal statutes." *Monter v. Gonzales*, 430 F.3d 546, 554 (2d Cir. 2005).

make. *Neder*, 527 U.S. at 16; *W.R.* Grace, 877 F.2d at 620. The government did not call witnesses from the bank to testify that variations in leverage ratios within a given range for which interest rates remain constant could influence the bank's decisions.[37] The only "decisions" that the bank could make, in the case the government presented to the jury, involved how much interest would be charged—an objective decision cabined by the ranges set in the Co-Borrowing Agreements.[38] The misrepresentation was material only if the jury could have concluded that the fraudulent leverage ratio resulted in the co-borrowers being in a different interest category than they would have been had the accurate leverage ratio been reported.[39] *Cf. Kungys*, 485 U.S. at 774-76.

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[37] We need not speculate whether such witnesses would affect this analysis.

[38] The government argues on appeal that, with respect to Count Twenty-Two, even if the difference between actual and misrepresented leverage ratios was insufficient to affect interest rates, the misrepresented leverage ratios were included in Borrowing Notices to the banks and may have affected the banks' decision to permit the OCH Co-Borrowers to obtain funds via the revolving loan agreement. We have not found, and the government has not identified, any point during the trial where this argument regarding materiality was made to the jury. Therefore, we will not consider it on appeal. *See supra* n.29.

[39] We are not deviating from the holdings of *Neder* and *Barrett* that the government has no burden to prove actual damages. *Neder*, 527 U.S. at 25; *Barrett*, 178 F.3d at 647-48. In this case, proof that the misrepresentation could affect a decision that the banks could make under the contract would also establish that the banks received less interest. An example may help explain that the proof required here only incidentally proved actual damages: If the government alleged that the actual leverage ratio would have permitted the banks to call the

With regard to Count Twenty-Two (involving the CCH Co-Borrowing Agreement), the government presented compliance documents and notes regarding manipulations of these documents, and Mulcahey testified that he reduced management fees from the CCH Co-Borrowing Group by $6 million to "put the borrowing group in a better position as far as the [interest] on the agreement." Handwritten notes dated October 1, 2001 state that the leverage ratio was 5.01, and the leverage ratio reported to the banks was 4.98. The term loan component of the CCH Co-Borrowing Agreement provided that a higher interest rate would be charged if the leverage ratio was above 5.0. There was sufficient evidence for the jury to conclude that the misrepresentations were material.[40]

With regard to Count Twenty-Three (involving the OCH Co-Borrowing Agreement), the evidence submitted to the jury cannot support a finding that any misrepresentations regarding the OCH Co-Borrowing Agreement were material. The

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loans, and the leverage ratio was manipulated to prevent the banks from so doing, the proof sufficient to show materiality need not also show that the bank suffered actual damages.

[40] We reject Defendants' argument that the management fee forgiveness was, as a matter of law, not fraudulent. Brown testified that there was "no legitimate basis" to reduce the management fees. The banks did not receive a fair and accurate picture of the co-borrowers' true finances as a result of this manipulation, and Mulcahey admitted that the only reason the management fees were forgiven was to entitle the banks to less interest. We think that the evidence presented by the government at trial as to the aggregate effect of the EBITDA trickle-down and the direct management expense schemes was sufficient to allow the jury to convict Defendants on Count Twenty-Two.

government did not proffer at trial the theory that the Borrowing Notice was a misrepresentation intended to influence the bank's decision to permit the co-borrowers to withdraw funds under the OCH Co-Borrowing Agreement. The evidence supporting the leverage ratio/interest rate manipulation scheme appears to boil down to Brown's conclusory opinion that bank debt compliance documents were manipulated in 2000 and 2001 because he had "reviewed documents that make it pretty clear, and had conversations with people while [he] worked there that were consistent with what [he] saw in the documents." This does not suffice to prove that Defendants made material misrepresentations to the banks regarding the OCH Co-Borrowing Agreement. *See Neder*, 527 U.S. at 24; *Rodriguez*, 140 F.3d at 168 (false statement not material because government set forth no evidence at trial that misrepresentation could have or did influence bank's decision).

"UNCHARGED CONDUCT" CLAIMS: THE BILL OF PARTICULARS DID NOT CONSTRUCTIVELY AMEND THE INDICTMENT AND DEFENDANTS FAILED TO SHOW THEY WERE PREJUDICED BY ANY ERROR IN ADMITTING EVIDENCE

Defendants next argue that they were prejudiced by the improper admission of uncharged crime evidence. The district court admitted, over Defendants' objection, evidence of certain acts that, Defendants allege, either occurred before the charged crimes or were not addressed in the Superseding Indictment or Bill of Particulars. In our view, most—if not all—of the evidence at issue was properly admitted, and any error was harmless.

At a pretrial hearing, Defendants requested a limiting instruction that proof of allegations that were contained in the Bill of Particulars [41] but absent in the indictment was "not admissible for purposes of proving the crimes in the indictment." The district court denied the request. At trial, the government proffered evidence that Defendants characterize as "twenty uncharged acts of alleged misconduct." They claim that seven of these acts took place prior to the period charged in the indictment, and ten of them were not mentioned in the Bill of Particulars but were "raised for the first time at trial."

Defendants make two arguments here: first, that the government constructively amended the indictment through the Bill of Particulars, and second, that the evidence of uncharged bad acts predating the indictment period was improperly admitted.

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[41] At Defendants' request, the district court ordered the government to provide a bill of particulars specifying the conduct it intended to prove when it used the phrase "among other things" in the Superseding Indictment. In one of the Bill's introductory paragraphs, the government stated that it "believe[d] that all of the conduct detailed herein [was] part of, or background to, the conspiracy and schemes charged in the Indictment." The government also gave notice—which it later withdrew—that it planned to offer proof, under Federal Rule of Evidence 404(b), of conduct that was not part of the conspiracy to show "among other things, the defendants' knowledge, fraudulent intent, lack of mistake, and the relationship of trust and reliance between the defendants." Soon after they received the Bill, Defendants argued to the district court that it constituted a constructive amendment of the Indictment, and they moved to prevent the government from offering evidence under Rule 404(b). The district court denied the motion.

VIII. CONSTRUCTIVE AMENDMENT THROUGH THE BILL OF PARTICULARS

Defendants argue that the Superseding Indictment was impermissibly broadened by the Bill, which specified the conduct the government intended when it used the phrase "among other things" in the indictment.

An indictment that fulfills the requirements of Federal Rule of Criminal Procedure 7(c)(1) but is nonetheless "insufficient to permit the preparation of an adequate defense" may be supplemented with a bill of particulars. *United States v. DiCesare*, 765 F.2d 890, 897 (9th Cir. 1985); *see also United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987). A bill of particulars "enabl[es a] defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States v. Davidoff*, 845 F.2d 1151, 1154 (2d Cir. 1988) (quoting *Bortnovsky*, 820 F.2d at 574). While "it is a settled rule that a bill of particulars cannot save an invalid indictment," *Russell v. United States*, 369 U.S. 749, 770 (1962), the bill's purpose is to "advise the defendant of the specific acts of which he is accused," *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (internal quotation marks omitted). Thus, a bill of particulars may contain facts not alleged in the indictment. *Cf. United States v. Jaswal*, 47 F.3d 539, 542-543 (2d Cir. 1995) (indictment that did not allege year of commission of offense was not defective; defendants could have "demand[ed] a bill of particulars specifying the date of the offense they were charged with"); *United States v. Bagaric*, 706

F.2d 42, 61-62 (2d Cir. 1983), *overruled on other grounds by Nat'l Org. forWomen, Inc. v. Scheidler*, 510 U.S. 249 (1994).

We have examined the Superseding Indictment and the Bill and are confident that the Bill merely particularizes the indictment by advising Defendants of the specific acts of which they are accused. *Walsh*, 194 F.3d at 47. The acts alleged in the Bill regard the "matter of proof to sustain" the charges in the indictment—including conspiracy to commit securities fraud, to make and cause to be made false statements in filings with the SEC, and to commit bank fraud; securities fraud; and bank fraud. *United States v. Mayo*, 230 F. Supp. 85, 86 (S.D.N.Y. 1964) (Weinfeld, J.). The Bill does not impermissibly add additional charges.[42] *See United States v. Pope*, 189 F. Supp. 12, 26 (S.D.N.Y. 1960) (Weinfeld, J.). The Bill of Particulars did not constructively amend the Superseding Indictment.

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[42] We find that the district court did not abuse its discretion in admitting evidence of acts that occurred during the period charged in the indictment. For example, the government presented evidence that Adelphia paid more than $500,000 for antiques in John Rigas's possession. The Superseding Indictment charged that Defendants "used Adelphia funds and other assets for their personal benefit, and that of other members of the Rigas family," and listed several allegations which, as shown by the use of "[a]mong other things," were intended only as examples. The Bill further specified that Adelphia paid $39 million to a furniture store owned by John and Doris Rigas. In notifying Defendants that the government would seek to prove that Adelphia made payments to John Rigas's furniture store, the Bill was sufficiently specific to permit Defendants to prepare for trial and to prevent surprise. *See Davidoff*, 845 F.2d at 1154.

IX. ADMISSIBILITY OF EVIDENCE

Defendants argue that the district court improperly admitted evidence of "bad acts" that predated the indictment period. This evidence, according to Defendants, was neither necessary to complete the story of the crime nor essential to provide background to the conspiracy.

We review a district court's "evidentiary rulings under a deferential abuse of discretion standard and give district court judges wide latitude in determining whether evidence is admissible at trial." *Meloff v. New York Life Ins. Co.*, 240 F.3d 138, 148 (2d Cir. 2001) (internal quotation marks omitted); *see also United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002). Abuse of discretion review requires more than concluding that the court below "made a different decision than we would have made in the first instance." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001). Instead, a court abuses its discretion when its decision "cannot be located within the range of permissible decisions" or is based on a clearly erroneous factual finding or an error of law. *United States v. Fuller*, 426 F.3d 556, 562 (2d Cir. 2005) (citations and internal quotation marks omitted).

The government argues that the acts were either properly charged or were "not considered other crimes evidence under Fed. R. Evid. 404(b)" because they "arose out of the same transaction or series of transactions as the charged offense, [were] inextricably intertwined with the evidence regarding the charged offense, or [were] necessary to complete the story of the crime on trial." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (quoting

United States v. Gonzalez, 110 F.3d 936, 942 (2d Cir. 1997)); *see also United States v. Inserra*, 34 F.3d 83, 89 (2d Cir. 1994). The government contends most of these acts were either repeated during the period of the charged conspiracy [43] or were recorded in Adelphia's ledgers in a way that affected Adelphia's financial statements into the period of the conspiracy. [44] We agree, and conclude that the

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[43] For instance, Christopher Thurner, John Rigas's private accountant, testified that in 1995 or 1996, John Rigas submitted false invoices to Adelphia for renting his condominiums in Cancun to Adelphia employees and guests. The invoices were false because, as Thurner testified, "[t]here were charges being made to Adelphia for guests that were not staying" at John Rigas's condominiums. Defendants argue that this conduct predated the indictment period and should not have been admitted. But Thurner testified John Rigas submitted similar fraudulent invoices to Adelphia about five or six times per year from 1995 or 1996 to 2002—well into the charged period. Thus, Thurner's explanation of how the fraudulent invoice scheme began was proper as context to "complete the story" of the scheme. *Carboni*, 204 F.3d at 44.

[44] John Rigas purchased for an RFE two separate cable systems in the early 1990s and then directed that Adelphia funds be used to pay off the notes. The pay-off period extended into the period alleged in the indictment. One purchase was consummated in 1992, but the payment schedule provided that the note would be paid over a ten-year period. The government submitted proof that Adelphia made payments for this system from June 1998 through January 2002. John Rigas purchased the other cable system in 1990, and the government presented evidence that Adelphia made interest payments on the note in the mid-1990s. Adelphia paid off the balance on the note in October 1999—again, within the charged period. The district court did not err in admitting testimony about these two cable system purchases because the scheme continued into the charged period. *Carboni*, 204 F.3d at 44.

district court did not abuse its discretion in admitting most—if not all[45]—of the disputed acts.

For any errors to warrant reversal, Defendants are required to show that the improperly admitted evidence had a "substantial and injurious effect or influence" on the jury's verdict. *Dukagjini*, 326 F.3d at 62 (citation omitted); *see Barnes*, 158 F.3d at 666, 673. Given the weight of evidence supporting the jury's verdict on each charge, we conclude that they have not done so. The Bill of Particulars did not constructively amend the indictment or constitute a prejudicial variance, and the district court did not err in admitting the evidence Defendants contend was uncharged or prior bad acts; regardless, any arguable error was harmless.

CONCLUSION

Defendants' convictions are AFFIRMED, except for their conviction on Count Twenty-Three, which is hereby REVERSED. The case is REMANDED for an entry of ACQUITTAL on Count Twenty-Three and for resentencing.

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[45] The government presented evidence that John Rigas induced Thurner to apply for a $20,000 loan from Adelphia in 1995 and then transfer it to him. The government argues that this act was admissible because, as the loan was unpaid even as of the date of trial, it should have been disclosed as a loan from Adelphia to John Rigas in proxy statements during the period charged in the indictment. As any error in admitting this evidence was harmless, we need not decide whether the loan, which was ostensibly between Thurner and John Rigas, should have been disclosed on the proxy statements during the period charged in the indictment.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITES STATES OF AMERICA :

-v. - : MEMORANDUM AND ORDER
S1 02 Cr. 1236 (LBS)

JOHN J. RIGAS,
TIMOTHY J. RIGAS,
MICHAEL J. RIGAS and
MICHAEL C. MULCAHEY

Defendants. :

Sand, District Judge

Defendants John J. Rigas and Timothy J. Rigas have moved for judgments of acquittal under Fed.R.Crim.P. 29(c) and/or new trials under Fed.R.Crim.P. 33. For the reasons set forth below, the defendants' motions are denied.

I. BACKGROUND

The government's superceding Indictment ("Indictment") charged defendants with participating in a conspiracy to defraud Adelphia, its banks, and its investors. The alleged objects of the conspiracy were securities fraud, wire fraud, false statements in SEC filings, false books and records, and bank fraud. The government also charged securities fraud, bank

fraud, and wire fraud as separate substantive counts.

On July 8, 2004, the jury returned a verdict convicting John Rigas and Timothy Rigas on Count One (conspiracy), Counts Two through Sixteen (securities fraud), and Counts Twenty-Two and Twenty-Three (bank fraud) of the Indictment. The jury acquitted all defendants of Counts Seventeen through Twenty-One (wire fraud).

II. THE RULE 29 MOTIONS

A. The Legal Standard under Rule 29(c)

A defendant challenging the sufficiency of the evidence "bears a heavy burden." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (quoting *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001)). "It is axiomatic on motion for acquittal that all reasonable inferences are to be resolved in favor of the prosecution and the trial court is required to view the evidence in the light most favorable to the Government with respect to each element of the offense." *United States v. Artuso*, 618 F.2d 192, 195 (2d Cir. 1980) (citing *United States v. Skinner*, 425 F.2d 552, 554 (D.C. Cir. 1970)); *see also United States v. Moore*, 208 F.3d 411, 413 (2d Cir. 2000). Furthermore, in review of Rule 29(c) claims, "pieces of evidence must be viewed not in isolation but in conjunction." *United States v. Miller*, 116 F.3d 641, 676 (2d Cir. 1997); *accord United States v. Pitre*, 960 F.2d 1112, 1120-21 (2d Cir. 1992). In matters of factual determinations, the Court must defer to the jury's verdict. "These strict rules are necessary to avoid judicial usurpation of the jury function. The court should not substitute its own determination of

the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984).

However, "the government must do more than introduce evidence 'at least as consistent with innocence as with guilt.'" *United States v. Mulheren*, 938 F.2d 364, 372 (2d Cir. 1991) (citing *United States v. Mankani*, 738 F.2d 538, 547 (2d Cir. 1984)). A court must grant a motion for a judgment of acquittal "if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Mariani*, 725 F.2d at 865 (citing *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). "A reasonable mind must be able to conclude guilty on each and every element of the charged offense." *Id.* (citing *United States v. Macklin*, 671 F.2d 60, 65 (2d Cir. 1982).

1. John Rigas's Motion

John Rigas argues that the government presented no evidence linking him to the false disclosures and failures to disclose that formed the basis of his securities fraud, bank fraud, and conspiracy convictions. This contention is without merit.

The government presented testimony that John Rigas discussed with Jim Brown the falsification of Adelphia's publicly disclosed subscriber numbers and manipulations to Adelphia's EBITDA. Accordingly, the jury could infer that when John Rigas approved press releases containing false or misleading statements about Adelphia's subscriber growth rate and EBITDA, signed 10–K forms containing false statements about Adelphia's

EBITDA, and directed Jim Brown "to do what [he] ha[d] to do" to avoid bank default, he was complicit in defrauding Adelphia's shareholders and its lenders.

As for the conspiracy charge, John Rigas acknowledges that his alleged instruction to Jim Brown "to do what [he] ha[d] to do" to avoid bank default must be accepted as evidence of an agreement for purposes of this motion. However, he argues that the government presented no evidence of an overt act in furtherance of this agreement. Yet, the filing of loan compliance certificates that used manipulated EBITDA numbers to misrepresent Adelphia's leverage ratio qualify as an overt act.

Therefore, John Rigas's current motion does not alter this Court's previous determination that the government made out a prima facie case on each of the counts charged.

2. Timothy Rigas's Motion

Timothy Rigas argues that the government failed to present sufficient evidence to convict him of bank fraud.[1] In particular, he asserts (1) that the government did not present evidence that he *participated* in the post-closing adjustments of compliance certificates related to either the CCH facility (Count Twenty-Two) or the OCH facility (Count Twenty-Three) and that evidence of his

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[1] Timothy Rigas also argues that his securities fraud convictions on Count Two through Sixteen were multiplicitous. The Court addressed this in defendants' pre-trial motions. *United States v. Rigas*, 281 F.Supp. 2d 660, 665-67 (S.D.N.Y. 2003).

participation in EBITDA manipulations is insufficient because it does not fall within the bank fraud theory charged in the Indictment, (2) that the government did not present evidence that the EBITDA manipulations had a *material* impact on the interest rate Adelphia paid or on its compliance status, and (3) that the government's failure to introduce a compliance certificate for the OCH facility precluded the jury from finding a material *misrepresentation* with respect to that facility and convicting him on Count Twenty-Three. The Court shall address these arguments in turn.

Participation in a bank fraud scheme is required to convict a defendant pursuant to 18 U.S.C. § 1344. *See United States v. Barrett*, 178 F.3d 658, 647-48 (2d Cir. 1999). At trial, the government elicited evidence through the testimony of Jim Brown that Timothy Rigas attended meetings in the 1990s to discuss making fraudulent adjustments to bank compliance reports. At these meetings, Brown testified that participants would review Adelphia's actual results and compare them with the measures set out in the credit agreements. It was at Timothy Rigas's suggestion, according to Jim Brown, that Adelphia maintained these two sets of compliance books. Although Timothy Rigas's instruction and the meetings he attended took place before CCH and OCH facilities opened, Brown also testified that compliance report manipulations continued in 2000 and 2001, with Adelphia maintaining two sets of compliance books throughout that period, and that Timothy Rigas then remained in charge of bank compliance transactions.

Evidence of Timothy Rigas's participation is bolstered by Jim Brown's testimony that he oversaw

EBITDA manipulations that affected the compliance certificates provided to Adelphia's banks. The government presented evidence that these manipulations lowered Adelphia's leverage ratio so as to appear that Adelphia was complying with its credit agreements. Because such manipulations effectively constituted representations that the borrowers were in compliance with the agreements, the Court finds that it falls within the bank fraud theory charged in the Indictment. Accordingly, the Court finds sufficient evidence of Timothy Rigas's participation in the bank fraud scheme to uphold his convictions on Counts Twenty-Two and Twenty-Three.

As to Timothy Rigas's argument that the government presented insufficient evidence to prove the EBITDA manipulations were material, this too is without merit. "A misrepresentation is material if it's capable of influencing the bank's actions." *United States v. Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998). "A false statement is material if it has a 'natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *United States v. Whab*, 355 F.3d 155, 163 (2d Cir. 2004) (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)). Jim Brown testified that the EBITDA manipulations would cause Adelphia's leverage ratio to appear lower than it really was, potentially causing banks to "get less interest payments than they had bargained for." Accordingly, the Court rejects Timothy Rigas's contention that the government presented insufficient evidence of materiality to support a conviction.

Finally, with respect to the OCH facility that is the subject of Count Twenty-Three, Timothy Rigas cites *Rodriguez* to support the proposition that a bank fraud conviction cannot stand without proof of a misrepresentation. However, what was at issue in *Rodriguez* was whether the defendant's undisputed actions in presenting checks to a bank for deposit and payment could themselves constitute fraudulent representations to the bank. 140 F.3d at 167. Here, in contrast, the absence of a compliance certificate for the OCH facility poses a question, not of whether EBITDA manipulations, if they were made, would have constituted a material misrepresentation, but of whether sufficient evidence was introduced to permit the jury to conclude that such manipulations were in fact made and that a compliance certificate reflecting those manipulations was filed.

The government argues that these are permissible inferences on the basis of Jim Brown's testimony. Brown testified that Adelphia's credit agreements required the company to file compliance certificates reporting the company's EBITDA each quarter and 2) that the reported EBITDA results were manipulated in every quarter during his tenure, in part to defraud Adelphia's bank lenders. In addition to Brown's testimony, the government presented several actual compliance certificates for credit facilities other than the OCH facility.

Under Fed. R. Evid. 406, evidence of the routine practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice. There is also ample authority to support the upholding of convictions on the basis of

routine practice evidence. *See, e.g., United States v. Ware*, 282 F.3d 902, 906-07 (6th Cir. 2002); *United States v. Collins*, 1994 U.S. App. LEXIS 34201 (7th Cit. 1994). Here, Adelphia appears to have adopted a routine practice of filing compliance certificates when its credit agreements required it to do so. On the basis of this practice and Brown's testimony, the jury could have concluded that Adelphia filed compliance certificates for the OCH facility and that the EBITDA on those certificates was manipulated so as to defraud Adelphia's banks. In short, viewing the evidence in the light most favorable to the government, the government's failure to introduce any compliance certificates for the OCH facility does not preclude a conviction on Count Twenty-Three.

III. THE RULE 33 MOTIONS

John Rigas and Timothy Rigas also move for a new trial pursuant to Fed.R.Crim.P. 33. Rule 33 provides that the court may grant new trial "if the interest of justice so requires." "It is only when it appears than an injustice has been done that there is a need for a new trial 'in the interest of justice.' Although a trial court has broader discretion to grant a new trial pursuant to Rule 33 than to grant a motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29 ... that discretion should be exercised sparingly." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). "Because motions for a new trial are disfavored in this Circuit the standard for granting such a motion is strict." *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995).

John Rigas and Timothy Rigas argue that they are entitled to a new trial on grounds that evidence

of acts not charged in the Indictment was improperly admitted. Under *United States v. Inserra*, "evidence of other bad acts may be admitted to provide the jury with the complete story of the crimes charged by demonstrating the context of certain events relevant to the charged offense." 34 F.3d 83, 89 (2d Cir. 1994). Throughout the trial, the Court ensured that evidence would be admitted as background only if it related to practices or policies that continued into the period of the Indictment and, therefore, helped to provide the jury with the complete story of the crimes charged. As to the defendants' claim of constructive amendment, the Court ensured that the specific pieces of evidence it admitted fell within the allegations made in the Indictment.

The Court has also already addressed the issues relevant to defendants' alternative argument for a new trial, *i.e.*, that the government proved multiple conspiracies rather than a single conspiracy. 281 F. Supp. 2d 660, 664-65.

IV. CONCLUSION

For the reasons set forth above, the defendants' motions for judgments of acquittal and/or new trials are denied in their entirety.

SO ORDERED.

Dated: New York, New York

November 15, 2004

s/ Leonard B. Sand
U.S.D.J.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Catherine O'Hagan Wolfe
Clerk

Date:	
Docket Number:	05-3577-cr
Short Title:	USA v. Rigas (Timothy)
DC Docket Number:	02-cr-1236
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Leonard Sand

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of July, two thousand seven.

Present:

Hon. Meskill,
Hon. Cabanes,
Hon. Wesley,
CIRCUIT JUDGES.

United States of America,
Appellee,
v. 05-3577-cr(L),
Timothy J. Rigas, 05-3587-cr (CON)
and John J. Rigas,

Defendant-Appellants.

A petition for panel rehearing having been filed herein by Defendant Appellants Timothy J. Rigas and John J. Rigas.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the court,
Catherine O'Hagan Wolfe, Clerk

By: /s/(illegible) Heller
Motion Staff Attorney

APPENDIX D

17 C.F.R. §240.10b-5

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

15 U.S.C. § 78ff(a)

Willful violations; false and misleading statements. Any person who willfully violates any provision of this title (other than section 30A [15 USCS § 78dd-1]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the

terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title [15 USCS § 78o(d)], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. § 78j(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]), any manipulative or deceptive device or contrivance in

contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) to the same extent as they apply to securities. Judicial precedents decided under section 17(a) of the Securities Act of 1933 [15 USCS § 77q(a)] and sections 9, 15, 16, 20, and 21A of this title [15 USCS §§ 78i, 78o, 78p, 78t, and 78u-1], and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) to the same extent as they apply to securities.

18 U.S.C. § 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons

do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1344

Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITES STATES OF AMERICA	:	
	:	INDICTMENT
-v. -		
		S1 02 CR. 1236
JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY		(LBS)
	:	
Defendants.		
	:	

----------x

COUNT ONE

(Conspiracy to Commit Securities Fraud, Wire Fraud, False Statements in SEC Filings, False Books and Records and Bank Fraud)

The Grand Jury charges:

BACKGROUND

I. RELEVANT PARTIES AND ENTITIES

1. At all relevant times, Adelphia Communications Corporation ("Adelphia") was a Delaware corporation with its principal place of business in Coudersport, Pennsylvania. In or about

1986, Adelphia was organized as a holding company, which conducted its primary business operations through various subsidiaries and affiliates. At all relevant times, Adelphia's principal business was operating cable television systems throughout the United States. As of December 31, 2000, Adelphia was the sixth largest cable television provider in the United States and operated cable systems in at least approximately 32 states with approximately five million subscribers, including subscribers in the Southern District of New York. On or about June 25, 2002, Adelphia filed a bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York.

2. At all relevant times, JOHN J. RIGAS, the defendant, was the Chairman of the Board of Directors, President, and Chief Executive Officer of Adelphia. Until his resignation in or about May 2002, JOHN J. RIGAS was principally and ultimately responsible for the management of Adelphia's business. JOHN J. RIGAS is the father of TIMOTHY J. RIGAS and MICHAEL J. RIGAS, the defendants. Members of the family of JOHN J. RIGAS, including his wife, sons, daughter and son-in-law, are referred to collectively herein as "the Rigas Family."

3. At all relevant times, TIMOTHY J. RIGAS, the defendant, was Executive Vice President, Chief Financial Officer, Chief Accounting Officer and Treasurer of Adelphia, and was a member of the Board of Directors of Adelphia. Until his resignation in or about May 2002, TIMOTHY J. RIGAS was responsible for the financial management of Adelphia and reported to JOHN J. RIGAS. From in or about December 1992 through

in or about June 2001, TIMOTHY J. RIGAS was the Chairman of the Audit Committee of the Board of Directors of Adelphia.

4. At all relevant times, MICHAEL J. RIGAS, the defendant, was Executive Vice President for Operations, Secretary, and a member of the Board of Directors of Adelphia. Until his resignation in or about May 2002, MICHAEL J. RIGAS was responsible for the business operations of Adelphia and reported to JOHN J. RIGAS.

5. At all relevant times, MICHAEL C. MULCAHEY, the defendant, was Director of Internal Reporting for Adelphia. At all relevant times, MULCAHEY reported to TIMOTHY J. RIGAS. MULCAHEY participated in, among other things, the management of Adelphia's treasury functions, including the supervision of money flowing into and out of Adelphia, its reporting to lenders and debt security holders regarding its financial condition, and its internal record keeping regarding expenditures on behalf of, among other things, the Rigas Family and entities that they owned and controlled.

6. At all relevant times, James R. Brown and Timothy A. Werth, co-conspirators not charged as defendants in this Indictment, were officers of Adelphia.

a. At all relevant times, Brown was Vice President of Finance for Adelphia. Until his resignation in or about May 2002, Brown reported to TIMOTHY J. RIGAS. Brown participated in, among other things, raising capital through securities transactions, bank loans and other methods, preparing Adelphia's financial statements and public

disclosures regarding its operating and financial performance and Adelphia's communications with investors, securities analysts, credit rating agencies and the public.

b. From in or about February 2000 through in or about May 2000, Werth was the Director of External Reporting for Adelphia. From in or about May 2000 through in or about May 2002, WERTH was the Director of Accounting for Adelphia. In both those positions, WERTH's responsibilities included supervising the preparation of Adelphia's financial statements and other books and records, including, among other things, financial statements included in: filings with the SEC; Adelphia press releases; and information provided to creditors of Adelphia and its affiliates.

II. RIGAS FAMILY CONTROL OF ADELPHIA

7. At all relevant times, two classes of Adelphia common stock were issued and outstanding: Class A, which exercises one vote per share, and Class B, which exercises 10 votes per share. As of in or about January 2002, the Rigas Family owned or controlled only approximately 12.5 percent of Adelphia's approximately 186,683,167 outstanding Class A shares. However, at all relevant times, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with other members of the Rigas Family, owned and controlled approximately 100 percent of Adelphia's Class B Shares. As of in or about January 2002, approximately 25,055,365 shares of Class B common stock were issued and outstanding. Thus, although the Rigas family did not own or control a majority of

Adelphia's outstanding Class A common stock, as a result of the above-described two-class share structure and the voting power of the Class B common stock, at all relevant times, the Rigas Family controlled a majority of Adelphia shareholder votes.

8. Under Adelphia's Certificate of Incorporation, Adelphia Class A shares elect only one of Adelphia's nine directors. Thus, at all relevant times prior to in or about May 2002, as a result of the Rigas Family's stock ownership, Adelphia's Certificate of Incorporation, and an agreement among the Class B stockholders, members of the Rigas Family had the power to elect, and did elect, eight of nine Adelphia directors. At all relevant times, five of Adelphia's nine directors -- including JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, the third son of JOHN J. RIGAS, and the son-in-law of JOHN J. RIGAS -- were members of the Rigas Family. At all relevant times, one or more members of the Board of Directors were not members of the Rigas Family. The members of Adelphia's Board of Directors who were not members of the Rigas Family are referred to herein as the "Outside Directors."

9. At all relevant times prior to on or about June 3, 2002, Adelphia's Class A common stock was registered with the United States Securities and Exchange Commission ("SEC") and was publicly traded on the NASDAQ National Market System. On or about January. 2, 2002, the closing price for Adelphia's Class A common stock was approximately $31.85. On or about June 3, 2002, Adelphia's Class A common stock was delisted by NASDAQ, and at all relevant times thereafter

was traded on the over-the-counter market at pennies per share.

10. Based on the Rigas Family's control of the Adelphia shareholder votes and Board of Directors, the Rigas Family controlled all of Adelphia's corporate affairs, including decisions on matters such as amendments to Adelphia's Certificate of Incorporation and Bylaws, mergers and acquisitions, and other fundamental corporate transactions such as compensation for officers, the issuance of stock, and the use of Adelphia's capital.

11. At all relevant times, pursuant to, among other things, the corporate bylaws of Adelphia, it was required that transactions between Adelphia and its directors or officers, or any entity owned or controlled by any of them, be approved by the board of directors, or by the shareholders. Based on such requirements, contracts or transactions between Adelphia and the Rigas Family, or entities owned or controlled by them, were required to be approved by the Board of Directors of Adelphia, or by the shareholders, after disclosure of the material facts concerning the Rigas Family's relationship to, or interest in, such contracts or transactions.

III. RIGAS FAMILY ENTITIES

A. Cable RFEs

12. At all relevant times, in addition to controlling Adelphia, the Rigas Family owned and controlled various entities (Rigas Family Entities or "RFEs"), including certain cable television properties ("Cable RFEs") that were managed and operated by Adelphia pursuant to certain management

agreements. Under the management agreements, Adelphia managed all aspects of the Cable RFEs' businesses, including marketing, billing, and payment of operating expenses. In exchange, the Cable RFEs agreed to pay Adelphia a management fee of approximately five per cent of their revenues for each quarter.

B. Other RFEs (Non-Cable RFEs)

13. In addition to the Cable RFEs, the Rigas Family owned and controlled a number of entities which did not provide cable television service to consumers ("Other RFEs"). For example, members of the Rigas Family owned and controlled such businesses as a furniture and interior design company, as well as numerous partnerships and other entities the sole function of which was to hold securities and other assets.

14. Although the Other RFEs had no cable business for Adelphia to manage, the operations and financial dealings of the Other RFEs were commingled with Adelphia, its subsidiaries, and the Cable RFEs. For example, Adelphia employees regularly performed work for the Other RFEs, their accounts payable were regularly paid with funds held in Adelphia's bank accounts, and they were not required to settle their debts to Adelphia in cash, but were permitted to accrue balances owing to Adelphia, often on an interest-free basis.

15. In addition, these Other RFEs often used Adelphia's capital to conduct their activities. Thus, although the Other RFEs were not Adelphia subsidiaries and were wholly owned by the Rigas Family, they were treated in effect as if they were

Adelphia entities, with little or no recognition of their divergent ownership or interests.

IV. ADELPHIA'S CASH MANAGEMENT SYSTEM

16. At all relevant times, the operating revenues and expenses of Adelphia, its subsidiaries, and the RFEs (including both Cable RFEs and certain Other RFEs) were organized, collected, and expended through a centralized cash management system ("CMS"). The accounts that made up the Adelphia CMS were maintained at First Union National Bank ("First Union") in Pensacola, Florida.

17. From in or about October 2001, up to and including May 2002, under the CMS, all cash received by Adelphia, its subsidiaries, or the RFEs was swept, on a regular basis, into a central cash management account from which nearly all expenses of Adelphia, its subsidiaries, and the RFEs were paid. Revenues and expenses of particular entities within the CMS were accounted for through inter-company debits and credits within the CMS.

18. For example, under the CMS, if a Cable RFE received a payment from a subscriber, the cash from that payment would be swept into Adelphia's central cash management account, and that RFE would receive an inter-company credit in the amount of the payment. Similarly, if a Cable RFE incurred an expense to an entity outside Adelphia, a check or wire transfer would be drawn on Adelphia's central cash management account, and the particular entity would receive an inter-company debit in the amount of the payment.

19. Under the CMS, no distinction was drawn between Adelphia, its subsidiaries, and the RFEs (whether Cable or Other). Adelphia maintained the books and records for certain of the RFEs on a general ledger system shared with Adelphia and its subsidiaries. In addition, no regular policy for billing and collection of interest resulting from balances under the CMS was maintained with regard to Adelphia's subsidiaries or the RFEs.

20. Although the financial affairs of Adelphia and the RFEs were commingled, and although Adelphia managed nearly all aspects of the RFEs' business affairs, the financial results of the RFEs were not consolidated or combined with Adelphia's results on Adelphia's financial statements.

21. Adelphia's Board of Directors did not approve the commingling of Adelphia's funds and the funds of the RFEs under the CMS, and the Outside Directors were not advised of this commingling.

V. ADELPHIA'S RAPID EXPANSION THROUGH LEVERAGED ACQUISITIONS

22. From on or about December 31, 1998 through on or about December 31, 1999, Adelphia's basic cable subscribers increased from approximately 2,200,000 to approximately 5,000,000. The principal reason for that increase was Adelphia's acquisition of other cable operators. The largest of those acquisitions were the following:

a. On or about October 1, 1999, Adelphia acquired Century Communications

Corporation ("Century"), which served approximately 1,610,000 basic subscribers located primarily in California and Puerto Rico. In connection with the acquisition of Century, Adelphia paid approximately $811,900,000 in cash and approximately 47,800,000 shares of newly issued Class A common stock, and assumed approximately $1.7 billion of debt.

b. On or about October 1, 1999, Adelphia acquired Frontier Vision Holdings, L.P. ("Frontier Vision"), which served approximately 710,000 basic subscribers located primarily in Ohio, Kentucky, New England and Virginia. In connection with the acquisition of Frontier Vision, Adelphia paid approximately $543,300,000 in cash and approximately 6,900,000 shares of newly issued Class A common stock, and assumed approximately $1.15 billion of debt.

c. On or about October 1, 1999, Adelphia acquired Harron Communications Corp. ("Herron"), which served approximately 296,000 basic subscribers located primarily in southeastern Pennsylvania, Michigan, Massachusetts and New Hampshire. In connection with the acquisition of Harron, Adelphia paid approximately $1,211,704,000.

23. The aggregate purchase price for Adelphia's acquisitions in or about 1999, including the acquisitions described above, was at least approximately $9,859,000,000.

VI. ADELPHIA'S HIGHLY LEVERAGED CAPITAL STRUCTURE

24. From on or about December 31, 1998 through on or about December 31, 1999, Adelphia's

total reported debt increased from approximately $3.53 billion to approximately $9.29 billion. By December 31, 2000, Adelphia's total reported debt had increased to approximately $12.6 billion.

25. At all relevant times, based upon, among other things, its rapid expansion through leveraged acquisitions and the fact that it consistently spent more money on its operations than those operations generated, Adelphia's capital structure was highly leveraged. As set forth in paragraphs 27-43, below, Adelphia raised capital from three principal sources (1) secured loans from banks; (2) the sale of debt securities to the public; and (3) the sale of equity securities to the public.

26. From at least in or about 1999 through the filing of Adelphia's bankruptcy petition in or about June 2002, investors, lenders, securities analysts, and credit rating agencies publicly and repeatedly expressed concerns about Adelphia's ability to service its debt. Adelphia's publicly reported performance and publicly reported ratios of debt-to-equity and cash-flow-to-debt were therefore carefully watched by creditors and investors.

A. Adelphia's Secured Syndicated Bank Loans and the Co-Borrowing Agreements

27. At all relevant times, all of the operating assets used in Adelphia's business were owned by subsidiaries of Adelphia. Adelphia, as a holding company, was the indirect owner of those assets. It therefore was necessary for Adelphia to accomplish secured borrowing through its subsidiaries, which possessed the assets that served as security for loans. From time to time, a number

of Adelphia subsidiaries were combined into a "borrowing group" for purposes of obtaining capital through secured syndicated bank loans.

28. At all relevant times, Adelphia, through its subsidiaries, owed billions of dollars under these and similar credit facilities. For example, as of in or about June 2002, Adelphia, through various subsidiaries, was organized into approximately six borrowing groups, and had outstanding debt of approximately $6.8 billion in secured syndicated bank loans under approximately six different credit facilities.

29. At all relevant times, based on, among other things, Adelphia's substantial indebtedness as a percentage of cash flow and total assets, the agreements establishing each of Adelphia's credit facilities required that the borrowing group that was a party to the agreement not exceed (1) certain specified leverage ratios; (2) certain specified ratios of annualized operating cash flow to pro forma debt service; and (3) certain specified ratios of operating cash flow to interest expense. Each of the agreements further provided that if a borrowing group's ratio of cash flow to indebtedness fell below a specified threshold, that borrowing group was not in compliance with its credit agreement and was considered in default.

30. At all relevant times, the agreements establishing certain of Adelphia's credit facilities required that Adelphia report to its lenders, each quarter, as to whether the borrowing group that was a party to the agreement was in compliance with the terms of the credit facility, and, in particular,

whether the borrowing group was within the specified ratios discussed in paragraph 29, above.

31. At all relevant times prior to in or about 1996, only Adelphia subsidiaries were borrowers under these secured credit facilities. In or about March 1996, Adelphia's borrowing practices changed. From that time forward, Adelphia subsidiaries entered into a number of so-called "Co-Borrowing Facilities" together with various Cable RFEs. As a result, various Cable RFEs borrowed substantial sums of money, for which Adelphia's subsidiaries were jointly and severally liable, to finance business operations that were wholly owned by the Rigas Family, or to buy assets that were held for the sole benefit of the Rigas Family. Thus, the Rigas Family benefitted from loans for which the publicly held company, Adelphia, through its affiliates, was liable, and which diminished Adelphia's liquidity and access to working capital, without any economic benefit to Adelphia.

32. Beginning in or about March 1996 through in or about September 2001, as set forth in paragraph 35, below, in connection with the secured credit facilities established by the borrowing groups made up of its subsidiaries, Adelphia caused a number of borrowing groups to enter into agreements ("Co-Borrowing Agreements") with various Cable RFEs.

33. These Co-Borrowing Agreements provided that (1) a member of the borrowing group ("Co-Borrower") could borrow up to the entire amount of credit available under a given facility; and (2) each Co-Borrower was jointly and severally liable for the full amount of indebtedness under the credit

facility, without regard to which of the Co-Borrowers actually received funds borrowed under the facility.

34. As a result of these and other provisions of the Co-Borrowing Agreements, certain Cable RFEs were permitted to borrow amounts up to the total amount available under a given credit facility, and each member of the borrowing group of Adelphia subsidiaries would be jointly and severally liable for the full amount of the debt.

35. Adelphia subsidiaries were parties to, and jointly and severally liable with, certain Cable RFEs for credit extended under the Co-Borrowing Facilities identified below:

a. On or about March 29, 1996, Telsat Acquisition L.P. and Global Acquisition Partners L.P., both of which were Adelphia subsidiaries, together with Highland Video Associates, a Cable RFE, as a Co-Borrower, entered into a credit agreement for a syndicated, secured credit facility in the amount of approximately $200,000,000.

b. On or about May 6, 1999, UCA Corp., UCA, LLC, National Cable Acquisition Associates, L.P., Grand Island Cable, Inc., SVHH Cable Acquisition, L.P., and Tele-Media Company of Hopewell-Prince George, all of which were Adelphia subsidiaries, together with Hilton Head Communications, L.P., a Cable RFE, as a Co-Borrower, entered into a credit agreement for a syndicated, secured credit facility in the amount of approximately $850,000,000. This facility is referred to herein as the "UCA Co-Borrowing Facility."

c. On or about April 14, 2000, Century Cable Holdings, LLC and Ft. Myers Cablevision, LLC, both of which were Adelphia subsidiaries, together with Highland Prestige Georgia, Inc., a Cable RFE, as a Co-Borrower, entered into a credit agreement for a syndicated, secured, credit facility in the amount of approximately $2.25 billion. The bank syndicate included Chase Securities, Inc., the Chase Manhattan Bank, Barclays Bank PLC (New York Branch), the Bank of New York, the Bank of Montreal (New York Branch) and the Bank of Nova Scotia (New York Branch), all of which were located in New York, New York. This facility is referred to herein as the "Century Co-Borrowing Facility."

d. . On or about September 28, 2001, Olympus Cable Holdings, LLC and Adelphia Company of Western Connecticut, both of which were Adelphia subsidiaries, together with Highland Video Associates, LP, Coudersport Cable Television Company, and Adelphia Holdings, 2001, LLC, all of which were Cable RFEs, as Co-Borrowers, entered into a credit agreement for a syndicated, secured, credit facility in the amount of approximately $2.03 billion. The bank syndicate included the Bank of New York, the Bank of Nova Scotia (New York Branch), the Bank of Montreal (New York Branch), Citicorp USA and the Chase Manhattan Bank, all of which were located in New York, New York. This facility is referred to herein as the "Olympus Co-Borrowing Facility."

36. Each of the Co-Borrowing Facilities described above are syndicated loans made by a group, or "syndicate," of banks and institutional investors. At all relevant times, the Co-Borrowing

Facilities were traded on the secondary market for syndicated loans, and were among the most widely quoted loans traded on that market.

B. Adelphia's Publicly Issued Notes and Preferred Stock

37. At various times, Adelphia, as well as its subsidiaries, issued and sold to the public bonds, debentures, notes and other debt securities, as well as preferred stock and various convertible securities. As of on or about June 1, 2002, Adelphia had approximately $6.9 billion in outstanding publicly issued debt securities and approximately $1.6 billion in convertible preferred stock, and various subsidiaries of Adelphia had a total of at least approximately $2.6 billion outstanding in publicly issued debt securities. At all relevant times, debt securities of Adelphia and its subsidiaries were registered with the SEC, and were traded in the over-the-counter market for such securities by dealers in New York, New York and elsewhere.

38. On or about the dates set forth below, Adelphia issued the following debt securities, among others:

ISSUE DATE	SECURITY	MATURITY	AMOUNT ISSUED
3/11/93	9.875% SENIOR DEBENTURES	3/1/05	$130,000,000
2/15/94	9.50% SENIOR NOTES	2/15/04	$150,000,000
2/26/97	9.875% SENIOR NOTES	3/1/07	$350,000,000
7/7/97	10.50% SENIOR NOTES	7/15/04	$150,000,000

ISSUE DATE	SECURITY	MATURITY	AMOUNT ISSUED
9/25/97	9.25% SENIOR NOTES	10/01/02	$325,000,000
1/21/98	8.375% SENIOR NOTES	2/1/08	$150,000,000
7/2/98	8.125% SENIOR NOTES	7/15/03	$150,000,000
11/12/98	8.375% SENIOR NOTES	2/1/08	$150,000,000
1/13/99	7.50% SENIOR NOTES	1/15/04	$100,000,000
1/13/99	7.75% SENIOR NOTES	1/15/09	$300,000,000
4/28/99	7.875% SENIOR NOTES	5/1/09	$350,000,000
11/16/99	9.375% SENIOR NOTES	11/15/09	$500,000,000
9/20/00	10.875% SENIOR NOTES	10/1/10	$750,000,000
6/12/01	10.25% SENIOR NOTES	6/15/11	$1,000,000,000
10/25/01	10.25% SENIOR NOTES	11/1/06	$500,000,000

39. At all relevant times, debt securities issued by Adelphia and its subsidiaries, including the securities set forth in paragraph 38, above, were assigned credit ratings by various credit rating agencies, including Moody's Investors Service, Inc. ("Moody's") and Standard & Poor's Ratings Services ("S&P"), both of which are located in New York, New York. At all relevant times, in New York, New York, Moody's and S&P periodically published their credit ratings and analyses of Adelphia and its debt securities, which were routinely relied upon by

investors in connection with the purchase and sale of Adelphia securities.

40. At all relevant times, indentures relating to Adelphia's publicly issued debt securities required Adelphia to report, each quarter, as to whether Adelphia was in compliance with certain permissible leverage ratios.

41. From at least in or about 1996 through in or about 1998, the vast majority of Adelphia's capital was raised through the above-described secured syndicated bank debt or publicly issued notes.

C. Adelphia's Common Stock

42. In or about late 1999, in connection with its rapid expansion through leveraged acquisitions, Adelphia issued large amounts of common stock to help pay for such acquisitions, as set forth in paragraph 22, above.

43. Because the Rigas Family's control of Adelphia was based on, among other things, the voting power of its stock, each issuance of additional common stock threatened the Rigas Family with further dilution and potential loss of control of Adelphia. From in or about 1998 through in or about March 2002, in connection with each major public offering of Adelphia Class A common stock, a "Rigas Direct Placement" was conducted, in which Adelphia issued Class B common stock directly to the Rigas Family in order to maintain the Rigas Family's economic ownership and voting control of Adelphia.

VII. ADELPHIA'S FINANCIAL DISCLOSURES

A. Periodic Financial Disclosures

44. At all relevant times, in order to sell securities to members of the public and maintain public trading of its securities in the United States, Adelphia was required to comply with provisions of the federal securities laws, including the Securities Exchange Act of 1934, and rules and regulations promulgated thereunder, which were designed to ensure that the company's financial information was accurately recorded and disclosed to the public.

45. Under these regulations, Adelphia was required to, among other things (a) file with the SEC annual financial statements audited by an independent, accountant; (b) file with the SEC quarterly updates of its financial statements that disclosed its financial condition and the results of its business operations for each three-month period; (c) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that the company's transactions were recorded as necessary to permit preparation of financial statements in conformity with Generally Accepted Accounting Principles ("GAAP") and other applicable criteria; and (d) make and keep books, records, and accounts that accurately and fairly reflected the company's business transactions.

46. From in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown, Werth and other Adelphia employees, participated in preparing, reviewing and certifying consolidated financial statements for Adelphia that purported to conform with applicable regulatory

requirements (hereinafter, the "Financial Statements"). The Financial Statements were filed with the SEC in Washington, D.C., and directly disseminated to the public, through press releases, quarterly reports on SEC Forms 10-Q and annual reports on SEC Forms 10-K, and in other communications with investors, credit rating agencies, bank lenders and securities analysts.

47. The Financial Statements filed with Adelphia's Forms 10-Q and Forms 10-K purported to disclose, among other things, Adelphia's earnings, net income and capital expenditures. In addition, in its Forms 10-Q and Forms 10-K, Adelphia reported other information about its performance, including its number of "basic cable subscribers."

B. Additional Material Disclosures

48. At all relevant times, in addition to its periodic financial reporting obligations, Adelphia routinely disclosed additional material information about its business and performance to the public.

1. Press Releases Announcing Quarterly Results

49. From at least on or about August 20, 1997 through on or about March 27, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown, Werth and other Adelphia employees, prepared, issued, reviewed, and approved a press release after the end of each quarter, which purported to outline Adelphia's operating results for the preceding quarter. These quarterly press releases purported to disclose, among other things, Adelphia's (1) EBITDA for the quarter; (2) EBITDA growth for the quarter; (3) number of

"basic cable subscribers; (4) growth of "basic cable subscribers;" (5) number of digital cable subscribers; and (6) number of high speed data subscribers.

50. At all relevant times, it was the policy and practice of Adelphia, instituted by TIMOTHY J. RIGAS and MICHAEL J. RIGAS, that each and every press release announcing quarterly results was reviewed and approved by every member of the Rigas Family before it was released.

51. Each and every such press release was transmitted by means of wire communications in interstate commerce, including facsimile transmissions and distribution on the Internet, to news organizations, financial institutions and individuals in New York, New York and elsewhere.

2. Conference Calls Announcing Quarterly Results

52. From at least on or about August 20, 1997 through on or about March 27, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown, Werth and other Adelphia employees, routinely participated in a conference call at or about the end of each quarter to discuss the company's results from the preceding quarter and the Adelphia press release announcing those results. These conference calls were announced to the public in advance, and were targeted to securities analysts, credit rating agency analysts and institutional investors in Adelphia.

53. At various times, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, along with Brown and other Adelphia employees, made oral presentations on such conference calls

concerning Adelphia's results, and responded to questions and comments from other participants on the calls.

54. At various times in the course of such conference calls, TIMOTHY J. RIGAS, MICHAEL J. RIGAS, along with Brown and other Adelphia employees, made representations about, among other things, Adelphia's (1) EBITDA for the quarter; (2) EBITDA growth for the quarter; (3) number of "basic cable subscribers"; (4) "basic cable subscriber" growth for the quarter; (5) number of digital cable subscribers; and (6) number of high speed data subscribers.

55. Each and every quarterly conference call was transmitted by means of wire communications in interstate commerce to conference call participants and others in New York, New York and elsewhere.

3. Other Disclosures

56. From at least in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown and other Adelphia employees acting at their direction, presented information about Adelphia's performance to the members of the investing public in a variety of one-on-one communications. Those communications included "road show" presentations, in which Adelphia representatives promoted Adelphia and its securities to investors, analysts and other market participants. Adelphia representatives also conducted one-on-one meetings with substantial investors, securities analysts, credit rating agencies and other market participants, in which they provided information concerning

Adelphia's financial condition, performance and other matters in connection with the market for Adelphia's securities. In addition, Adelphia representatives communicated frequently with analysts, investors and other market participants by telephone, e-mail, facsimile transmission and other forms of communication.

57. In the course of these presentations, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown and other Adelphia employees acting at their direction, made representations about, among other things (1) Adelphia's progress in upgrading or "rebuilding" its cable plant to enable delivery of digital cable, internet connections, video-on-demand and other services; (2) Adelphia's EBITDA and EBITDA growth; (3) the number and growth of Adelphia's "basic cable subscribers"; and (4) the number of Adelphia's high speed data subscribers.

THE SCHEME TO DEFRAUD

58. From in or about 1999 through in or about May 2002, as a result of Adelphia's rapid expansion and its large and growing debt load, Adelphia faced intense pressure to generate high levels of earnings to service that debt, and to take steps to reduce its debt. Among the sources of that pressure were the following:

a. Adelphia faced pressure to meet the financial performance expectations of investors and securities analysts, and risked a decline in the price of its publicly traded common stock if it failed to do so. Such a decline would not only have affected Adelphia adversely, but also would have had a direct and material adverse effect on the Rigas

Family, whose personal wealth was largely invested in Adelphia securities.

b. Adelphia faced pressure from credit rating agencies to generate consistently high levels of earnings and to reduce its financial leverage (that is, its debt-to-equity ratio), and risked reductions in its credit ratings if it failed to do so. Such reductions would have affected Adelphia adversely by limiting its access to additional capital, increasing its interest costs and decreasing the market price for its securities.

c. Adelphia faced pressure from its lenders, and the holders of its public debt securities, to comply with financial covenants under the Co-Borrowing Agreements, other loan agreements and the indentures related to its debt securities, and risked defaulting on its debts and other adverse consequences if it failed to do so.

59. As a result of those and other pressures, the financial results and activities of Adelphia were closely scrutinized, and Adelphia faced substantial adverse consequences if it failed to meet the expectations of investors, securities analysts, rating agencies and other market participants.

60. From in or about 1999 through in or about May 2002, Adelphia's true performance consistently failed to meet those expectations. During the same period, Adelphia's already high debt burden continued to grow.

61. In order to conceal Adelphia's failure to perform and its large and growing debt burden, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS, and MICHAEL C. MULCAHEY, together

with Brown, Werth and their co-conspirators, participated in a scheme to create the false appearance that Adelphia's operating performance was consistently in line with the expectations of investors, analysts and other market participants, and that Adelphia was systematically deleveraging through, among other means, sales of equity securities to the Rigas Family.

62. From at least in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, in violation of their fiduciary duties as officers and directors of Adelphia, its subsidiaries and affiliates, used Adelphia funds and other assets for their personal benefit, and that of other members of the Rigas Family. Among other things, the Rigas Family used Adelphia funds to construct a golf course on land primarily owned by JOHN J. RIGAS; routinely used Adelphia's corporate aircraft for their personal affairs, without reimbursement to Adelphia; and used at least approximately $252,157,176 in Adelphia funds to pay margin calls against loans to the Rigas Family. These uses of Adelphia funds and assets for the benefit of the Rigas Family were not presented to or authorized by the Adelphia Board of Directors, were not disclosed to the Outside Directors, and were not disclosed to the public.

63. From in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, Werth and their co-conspirators, participated in a scheme to defraud Adelphia's creditors and investors, by, among other things, making false and misleading statements,

including misrepresentations and omissions concerning the following material facts:

a. Adelphia's "off-balance-sheet" debt, in particular, Adelphia's joint and several liabilities under the Co-Borrowing Agreements, as set forth in paragraphs 64-72, below; the extent and circumstances of reductions in Adelphia's debt through, among other things, sales of securities to the Rigas Family and the public, as set forth in paragraphs 73-91, below;

b. Adelphia's operating performance, including, among other things, its earnings and other financial results, the number and growth of its "basic cable subscribers," and its progress toward completing the "rebuild" of its cable plant, as set forth in paragraphs 92-158, below;

c. Adelphia's compliance with certain debt covenants under the Co-Borrowing Agreements and Adelphia's bond indentures, as set forth in paragraphs 159-66, below; and

d. the unauthorized and unreimbursed use and conversion of Adelphia's funds and assets by the Rigas Family, as set forth in paragraphs 167-98, below.

VIII. FRAUD IN CONNECTION WITH ADELPHIA'S LIABILITIES UNDER THE COBORROWING AGREEMENTS

64. From at least in or about 1999 through in or about 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, caused Adelphia to make false and misleading statements of material

fact, and to omit to state material facts, concerning Adelphia's liabilities under the Co-Borrowing Facilities.

65. As set forth in paragraph 31, above, each of the Co-Borrowing Agreements provided that each co-borrower was jointly and severally liable for the entire amount of indebtedness under the applicable credit facility.

66. At all relevant times, Adelphia treated portions of its joint and several liabilities under the Co-Borrowing Facilities as "off-balance-sheet" liabilities. Accordingly, Adelphia did not report such portions of its liabilities on the consolidated balance sheets contained in its financial statements.

67. Pursuant to GAAP, Adelphia was required, among other things, to disclose the full amount of its joint and several liabilities under the Co-Borrowing Facilities in the notes accompanying its financial statements.

68. From in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, caused Adelphia to issue financial statements that contained material misrepresentations of fact, and omitted to state material facts, concerning Adelphia's joint and several liabilities under the Co-Borrowing Facilities.

69. On or about March 30, 2000, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS, and MICHAEL C. MULCAHEY, together with Brown, caused Adelphia to file a Form 10-K containing financial statements for the year ended December 31, 1999. The consolidated balance sheet

included in those financial statements reported only a portion of Adelphia's joint and several liabilities under the Co-Borrowing Facilities, and omitted at least approximately $250,000,000 of such liabilities. The notes accompanying the financial statements failed to disclose the full amount of Adelphia's outstanding joint and several liabilities under the Co-Borrowing Facilities. The consolidated balance sheet and notes accompanying the financial statements were false and misleading in that, among other things, they concealed the full amount of Adelphia's outstanding joint and several liabilities under the Co-Borrowing Facilities that were treated as "off-balance-sheet" liabilities by Adelphia.

70. On or about May 30, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, caused Adelphia to file a Form 10-K containing financial statements for the year ended December 31, 2000. The consolidated balance sheet included in those financial statements reported only a portion of Adelphia's joint and several liabilities under the Co-Borrowing Facilities, and omitted at least approximately $1.5 billion of such liabilities. The notes accompanying the financial statements failed to disclose the full amount of Adelphia's outstanding joint and several liabilities under the Co-Borrowing Facilities. The consolidated balance sheet and notes accompanying the financial statements were false and misleading in that, among other things, they concealed the full amount of Adelphia's outstanding joint and several liabilities under the Co-Borrowing Facilities that were treated as "off-balance-sheet" liabilities by Adelphia.

71. On or about March 27, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, caused Adelphia to issue a press release reporting its results for the fourth quarter and full year 2001. In a footnote near the end of that document, Adelphia disclosed that, as of December 31, 2001, the outstanding balance under the Co-Borrowing Agreements was approximately $2,284,000,000 greater than the liabilities disclosed on Adelphia's balance sheet. This was the first time that Adelphia disclosed (1) the actual indebtedness under the Co-Borrowing Agreements; and (2) that the liabilities disclosed on its balance sheet did not include the amount of indebtedness under the Co-Borrowing Agreements.

72. Subsequent to that disclosure, the market price for Adelphia's Class A common stock fell sharply, from a closing price of approximately $20.39 per share on or about March 26, 2002, to a closing price of approximately $14.90 per share on March 29, 2002. By April 26, 2002, the closing price of Adelphia's Class A common stock had fallen to approximately $6.00 per share.

IX. FRAUD IN CONNECTION WITH ADELPHIA'S PURPORTED DELEVERAGING

73. From at least in or about 2001 through in or about March 2002, in response to the concerns of investors, lenders and analysts about Adelphia's debt burden, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown and their co-conspirators, repeatedly represented that Adelphia was making substantial reductions in its

debt. In addition, the defendants and their co-conspirators repeatedly represented that the Rigas Family was demonstrating its commitment to reducing Adelphia's debt, by purchasing substantial amounts of Adelphia securities, and that the Rigas Family would and did pay Adelphia for those securities in immediately available funds.

74. As set forth in paragraphs 75-91, below, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown and their co-conspirators, omitted to disclose that, in fact, certain sales of Adelphia securities to the Rigas Family did not reduce Adelphia's debt, because Adelphia did not receive any funds in return for those securities. Rather, Adelphia purportedly was compensated for those securities by "assumptions" by certain RFEs of debt owed by Adelphia under certain Co-Borrowing Facilities. However, Adelphia's liabilities were not reduced by those purported assumptions, because Adelphia remained jointly and severally liable for all such debts under the terms of the applicable Co-Borrowing Agreements.

A. The January 2001 Rigas Direct Placements

75. At all relevant times, Adelphia was routinely characterized by market participants as one of the most highly leveraged cable operators. At various times from at least in or about June 1999 through approximately January 2002, JOHN J. RIGAS and TIMOTHY J. RIGAS acknowledged in public statements that Adelphia was highly leveraged, and represented that Adelphia was systematically reducing its leverage.

76. At all relevant times, Highland 2000, L.P. ("Highland 2000") was a Delaware limited partnership owned and controlled by JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS and members of their immediate family.

77. On or about January 17, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS caused Adelphia's Board of Directors to approve two direct sales of securities to Highland 2000. Those transactions included (a) the sale of approximately 5,819,367 shares of Adelphia Class B common stock for approximately $259,900,000; and (b) the sale of $167,400,000 aggregate principal amount 6 percent convertible subordinated notes due 2006, for approximately $163,000,000 ("Rigas Direct Placements").

78. In order to induce the Outside Directors to approve the Rigas Direct Placements, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Highland to agree to pay for those securities in "immediately available funds" not later than on or about October 22, 2001.

79. On or about January 17, 2001, MICHAEL J. RIGAS executed written agreements between Highland 2000 and Adelphia, in which Highland 2000 agreed to pay for the Rigas Direct Placements in immediately available funds. MICHAEL J. RIGAS signed those agreements on behalf of both Adelphia and Highland 2000.

80. In violation of that agreement, Highland 2000 never paid Adelphia for the Rigas Direct Placements, and JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS failed to disclose that fact to the Outside Directors.

81. On or about October 23, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release, which stated that it had closed on the Rigas Direct Placements, but which omitted to state the material fact that Adelphia had not received payment in immediately available funds, as required by the agreements between Adelphia and Highland 2000.

82. In or about January 2002, TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY caused Adelphia employees to make false and misleading entries in the books and records of Adelphia, including false and misleading journal entries on Adelphia's general ledger, which purported to show that, on or about October 22, 2001, Highland 2000 had paid a total of approximately $423,375,076 to Adelphia, as consideration for the Rigas Direct Placements. For the purpose of creating supporting documentation for those false and misleading entries TIMOTHY J. RIGAS and MULCAHEY took the following steps:

a. Prepared fictitious notices addressed to Bank of Montreal as administrative agent under the Olympus Co-Borrowing Facility, and inserted those notices into the books and records of Adelphia. Those notices referred to a purported borrowing and a purported paydown pursuant to that agreement, both in the amount of approximately $423,375,076, on or about October 22, 2001. The notices, which were signed by MULCAHEY, were falsely backdated to October 22, 2001, and were never sent to Bank of Montreal.

b. Prepared false and misleading receipts, which purported to acknowledge that, on or

about October 22, 2001, Adelphia received a total of approximately $423,375,076 in immediately available funds from Highland 2000, and inserted those receipts into the books and records of Adelphia. Those receipts were falsely backdated to October 22, 2001, and were signed by TIMOTHY J. RIGAS and MULCAHEY.

B. Misrepresentations to Moody's Investors Service

83. As set forth more fully below, this sham investment of additional cash by Highland 2000 had a material impact on Adelphia's credit rating and the price of its securities. Prior to this sham investment, on or about June 14, 2000, Moody's had placed Adelphia's credit ratings under review for a possible downgrade, citing, among other things, "Adelphia's significant appetite for acquisitions, at high cash flow multiples, and management's propensity to finance the same predominantly with debt."

84. On or about August 15, 2000, Moody's concluded its review and lowered all but one of Adelphia's credit ratings. Moody's stated that Adelphia "has placed notably greater financial strain on its balance sheet over the past year by continuing to effect acquisitions at increasingly higher purchase prices per subscriber with predominantly debt financing." Moody's also noted its "expectation that Adelphia will issue new equity over the near term in order to mitigate further deterioration of its core credit profile."

85. On or about June 7, 2001, Moody's assigned a rating to Adelphia's proposed issuance of approximately $400,000,000 in senior unsecured

notes. Moody's stated that its rating reflected, among other things, Adelphia's "very high financial leverage." Moody's also "cautioned that management must continue to execute operationally at a very high level, and must successfully demonstrate that it possesses both the ability and the desire to materially deleverage its balance sheet over the next 18 to 24 months (and to remain more conservatively capitalized thereafter) in order to maintain the current stable rating outlook, and potentially the current ratings altogether."

86. On or about August 20, 2001, Moody's changed its rating outlook for Adelphia to negative. Moody's stated that "Adelphia's extremely high financial leverage, both on an absolute basis and on a relative level within its peer group, continues to be cause for concern," and noted that Adelphia was "one of the most highly leveraged companies in the cable sector." However, Moody's also noted that Adelphia had "financial support from the Rigas Family," in the form of recent purchases of equity securities.

87. On or about October 22, 2001, Moody's placed all of Adelphia's credit ratings under review for possible downgrade.

88. On or about January 18, 2002, TIMOTHY J. RIGAS, together with Brown and other Adelphia employees, attended a meeting with representatives of Moody's at 99 Church Street in Manhattan. During that meeting, in order to induce Moody's not to downgrade Adelphia's credit ratings, TIMOTHY J. RIGAS and Brown made misrepresentations of material fact, and omitted to state material facts, including among others the following:

a. TIMOTHY J. RIGAS and Brown stated that Adelphia's bank debt was approximately $1.223 billion, and omitted to state the actual amount of Adelphia's off-balance-sheet debt, when in fact, as TIMOTHY J. RIGAS and Brown well knew, Adelphia's bank debt also included at least approximately $2.3 billion in off-balance-sheet debt for which Adelphia was jointly and severally liable under the Co-Borrowing Agreements;

b. TIMOTHY J. RIGAS and Brown stated that Adelphia's debt had been reduced by approximately $471,000,000 as a result of the Rigas Direct Purchases, but omitted to state that such purchases were not paid for in immediately available funds, but rather were financed by means of the Co-Borrowing Facilities, for which Adelphia was jointly and severally liable, such that Adelphia's debt was not in fact reduced by such amounts.

89. On or about January 22, 2002, in New York, New York, Moody's issued a press release stating that it had concluded the review of Adelphia's credit ratings that it began in or about October 2001. Based in part on the material misrepresentations and omissions made by TIMOTHY J. RIGAS and Brown on or about January 18, 2002, Moody's confirmed certain of those ratings, upgraded other ratings, and stated that its rating outlook for Adelphia was stable. Among other things, Moody's cited "the continued sponsorship of the Rigas Family" in purchasing hundreds of millions of dollars worth of Adelphia securities.

90. On or about March 28, 2002, after Adelphia disclosed that it had at least approximately $2,284,000,000 in off-balance-sheet debt under the

Co-Borrowing Agreements, Moody's issued a press release stating that it was reinitiating its review of Adelphia's credit ratings for possible downgrade. Moody's stated that it was "not fully aware of . . . the absolute magnitude and recent spike in these off-balance sheet borrowings [under the Co-Borrowing Agreements], and the fact that these proceeds were utilized (particularly at such a material level) to fund the Rigas Family's" purchases of Adelphia securities, "thereby diminishing somewhat the value of the 'true' equity contributions that ultimately led to the prior rating confirmations."

91. On or about May 3, 2002, May 15, 2002 and June 5, 2002, Moody's further lowered various credit ratings of Adelphia.

X. FRAUDULENT REPORTING OF ADELPHIA'S OPERATING RESULTS

92. From at least on or about August 20, 1997, through on or about March 27, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS, and MICHAEL C. MULCAHEY, together with Brown and Werth, caused Adelphia to fraudulently misrepresent numerous material facts about its performance contained in each of Adelphia's Forms 10-Q, Forms 10-K, quarterly results press releases and quarterly results conference calls.

93. Among the material facts that the defendants misrepresented in Adelphia's public disclosures were (1) Adelphia's EBITDA; (2) Adelphia's number of basic cable subscribers; and (3) Adelphia's progress in rebuilding its cable plant to provide internet access and other services.

A. Misrepresentations Concerning EBITDA

94. As a result of its highly leveraged capital structure, Adelphia was under pressure to deliver a consistently high level of operating performance.

95. At all relevant times, the amount and growth of a cable operator's EBITDA was considered to be important by investors, analysts and other market participants. EBITDA is a measure of corporate earnings that stands for "earnings before interest, taxes, depreciation and amortization."

96. From in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, along with Brown, Werth and other Adelphia employees, engaged in a pattern and practice of misrepresenting Adelphia's performance by artificially inflating the EBITDA disclosed by Adelphia in its Forms 10-K, Forms 10-Q, quarterly results press releases, and quarterly results conference calls. The defendants and other Adelphia employees artificially inflated Adelphia's publicly disclosed EBITDA by, among other means (1) engaging in sham transactions with affiliates to create the false appearance of revenue to Adelphia; and (2) engaging in sham transactions with other corporations to give the false appearance of revenue to Adelphia. Through these and other methods, the defendants and other Adelphia employees artificially inflated Adelphia's publicly disclosed EBITDA by approximately $160 million in 2000, and approximately $210 million in 2001.

1. Fraudulent Affiliate Fee Transactions

97. In or about October 2000, TIMOTHY J. RIGAS, along with Brown, Werth and other Adelphia employees, discovered that Adelphia's actual EBITDA for the third quarter of 2000 was below Adelphia's publicly disclosed predictions and market expectations. From at least October 2000 through on or about March 23, 2002, TIMOTHY J. RIGAS, along with Brown, Werth and other Adelphia employees, devised and executed a scheme to artificially inflate Adelphia's publicly disclosed EBITDA by causing Adelphia and certain of the RFEs to engage in transactions conceived and executed after the closing of the relevant financial reporting period, which misrepresented the amount of revenue earned by Adelphia from those RFEs.

98. As discussed above, the Rigas Family controlled not only Adelphia, but the RFEs, many of which were managed by Adelphia and were part of the Adelphia CMS. From time to time, pursuant to various management agreements, the Cable RFEs, and certain Other RFEs entered into management agreements with Adelphia pursuant to which they paid Adelphia a management fee equal to approximately five percent of their revenue for each quarter.

99. By definition, EBITDA includes a company's operating income, such as the five percent management fees owed to Adelphia by the Cable RFEs.

100. Beginning in or about October 2000, TIMOTHY J. RIGAS, together with Brown, Werth and other Adelphia employees, met after the close of

each quarter to review, among other things, Adelphia's actual EBITDA for the preceding quarter. During these meetings and at follow-up meetings, TIMOTHY J. RIGAS, together with Brown, Werth and other Adelphia employees, discussed the artificial inflation of Adelphia's publicly disclosed EBITDA through, among other means, the creation of post-closing transactions between Adelphia and certain RFEs for the purpose of artificially inflating Adelphia's publicly disclosed EBITDA, and the creation of bogus journal entries in Adelphia's books and records reflecting fraudulent transactions.

101. In particular, TIMOTHY J. RIGAS, together with Brown, Werth and other Adelphia employees acting at their direction, would determine a target number for Adelphia's publicly disclosed EBITDA, and would attempt to justify that figure by creating transactions -- after the books and records for the relevant financial reporting period had already closed -- between Adelphia and certain RFEs in which those RFEs would agree to pay money to Adelphia that Adelphia could book as revenue. These sham transactions lacked any economic or business basis, did not result in any actual funds being paid to Adelphia and misleadingly were recorded on Adelphia's books and records as having taken place during the relevant financial reporting period so as to affect that period's publicly disclosed EBITDA, although the transactions had been created and recorded after the end of that period.

102. After the end of each fiscal quarter, from in or about October 2000 through on or about March 23, 2002, TIMOTHY J. RIGAS, together with Brown, Werth and other Adelphia employees acting at their direction, caused Adelphia to book as

revenue "management fees" from certain RFEs that had no economic or business purpose, and were conceived and memorialized after the end of the period in which they were booked on Adelphia's books and records, among other reasons, for the purpose of artificially inflating Adelphia's publicly-disclosed EBITDA.

103. Consistent with the nature of the sham transaction, the amount of the "management fees" charged to the RFEs was not subject to *bona fide* negotiation was not based on any actual management services provided by Adelphia to the RFEs paying the fees, but rather was determined according to the amount by which JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees sought to artificially inflate Adelphia's publicly disclosed EBITDA for that quarter.

104. For the year 2001, TIMOTHY J. RIGAS, together with Brown, Werth and other Adelphia employees acting at their direction, fraudulently and misleadingly represented that approximately $5 million in interest expense owed by the RFEs to Adelphia was actually owed as management fees. As a result, TIMOTHY J. RIGAS, together with Brown, Werth and other Adelphia employees acting at their direction, fraudulently inflated Adelphia's publicly disclosed EBITDA by approximately $5 million for the year 2001.

105. In addition to the circular, sham transaction relating to management fees described above, TIMOTHY J. RIGAS, together with Brown, Werth and other Adelphia employees acting at their direction, caused Adelphia to record as revenue other

baseless fees owed by RFEs and Adelphia subsidiaries to Adelphia for the purpose of inflating Adelphia's publicly disclosed EBITDA.

106. For example, in or about October 2000, TIMOTHY J. RIGAS, together with Brown, Werth and other Adelphia employees acting at their direction, caused Adelphia to record as revenue at least approximately $8 million in so-called debt placement fees from Cable RFEs, even though Adelphia had never in the past, and never again, charged the Cable RFEs a fee for debt placement. This fee was conceived and recorded for the sole purpose of inflating Adelphia's publicly disclosed EBITDA, and had no business purpose. Moreover, the amount of the fee had no basis in fact, but rather was determined by TIMOTHY J. RIGAS, Brown and Werth based on the amount they sought to artificially inflate Adelphia's EBITDA in that quarter.

107. Similar fraudulent transactions relating to RFE management fees were undertaken in each quarter from at least on or about January 1, 2000 through on or about December 31, 2001. As a result of these and similar fraudulent transactions, in or about 2000, Adelphia's publicly reported EBITDA was artificially inflated by approximately $34.9 million, or approximately 10 percent. Similarly, in or about 2001, Adelphia's publicly reported EBITDA was artificially inflated by approximately $32.2 million, or approximately 14 percent.

2. Fraudulent Marketing Support Transactions With Cable Converter Box Manufacturers

108. From in or about June 2000 through in or about May 2002, TIMOTHY J. RIGAS, together with Brown, Werth and their co-conspirators, in addition to causing Adelphia to enter into sham transactions with affiliates for the purpose of artificially inflating Adelphia's EBITDA, also caused Adelphia to enter into sham transactions with other companies for the same purpose.

a) Background

109. Beginning in or about the late 1990s, digital cable television service became a high-margin, high-growth business for Adelphia. At all relevant times, in order to provide digital cable television service, it was necessary for Adelphia to purchase digital cable converter boxes for installation in customers' homes. As a result of competitive pressure to provide digital cable service, purchases of digital cable converter boxes became a large capital expense for Adelphia, and made Adelphia an important customer of two of the largest manufacturers of such converter boxes, Corporation No. 1 and Corporation No. 2.

110. On or about May 23, 2000, Adelphia entered into a purchase agreement with Corporation No. 1 for digital converter boxes. This purchase agreement provided that Corporation No. 1 would provide certain quantities of converter boxes to Adelphia during 2000 and 2001 at certain specified prices. The purchase agreement further specified that Adelphia was guaranteed prices that were no less favorable than those offered to Corporation No.

1's other customers. The purchase agreement did not provide for or mention payments for marketing support from Corporation No. 1 to Adelphia.

111. On or about May 23, 2000, Adelphia entered into a purchase agreement with Corporation No. 2 for digital converter boxes. This purchase agreement provided that Corporation No. 2 would provide certain quantities of converter boxes to Adelphia during 2000 and 2001 at certain specified prices. The purchase agreement did not provide for or mention payments for marketing support from Corporation No. 1 to Adelphia.

b) The False Journal Entries

112. In or about June 2000, TIMOTHY J. RIGAS, together with Brown and Werth, determined that, based on its actual performance in the Second Quarter of 2000, Adelphia's EBITDA was below its predictions and the expectations of analysts and other market participants.

113. In or about June 2000, in order to fraudulently inflate Adelphia's EBITDA, TIMOTHY J. RIGAS, together with Brown and Werth, devised a plan to enter into sham "marketing support" agreements with Corporation No. 1 and Corporation No. 2, for the purpose of artificially inflating Adelphia's EBITDA. "Marketing support" was a term used in the cable industry to refer to payments made by a vendor to a cable operator as compensation for the cost of marketing efforts undertaken by the cable operator on behalf of the vendor or the vendor's products.

114. Beginning in or about August 2000, TIMOTHY J. RIGAS, together with Brown and Werth, caused Adelphia to record marketing support payments from Corporation No. 1 and Corporation No. 2 as revenue on Adelphia's books and records for the purpose of artificially inflating Adelphia's EBITDA. For the quarter ending June 30, 2000, TIMOTHY J. RIGAS, Brown and Werth caused Adelphia to record approximately $7,035,004 in marketing support payments from Corporations No. 1 and No. 2. For the quarter ending September 31, 2000, TIMOTHY J. RIGAS, Brown and Werth caused Adelphia to record $12,778,772 in such payments. TIMOTHY J. RIGAS, Brown and Werth caused Adelphia to record these amounts as revenue despite the facts that (1) no marketing support payments had been received from Corporations No. 1 and No. 2; (2) no such payments were owed to Adelphia; and (3) at the time, Adelphia had no agreements to receive marketing support payments from either Corporation No. 1 or Corporation No. 2.

115. In or about late October 2000, TIMOTHY J. RIGAS., together with Brown and Werth, undertook various actions to give the appearance of legitimacy to the above-described entries of revenue on Adelphia's books and records before Adelphia's financial statements were audited at the end of 2000. Accordingly, TIMOTHY J. RIGAS, Brown and Werth caused Adelphia to begin negotiating with Corporations No. 1 and No. 2, in the hope of reaching an agreement for marketing support payments to Adelphia.

116. Because Adelphia had entered into purchase agreements with Corporations No. 1 and No. 2 in May 2000 which specified the quantities and

prices of digital converter purchases by Adelphia, Corporations No. 1 and No. 2 were not willing to provide marketing support payments that would change the economic arrangements memorialized in the May 2000 contracts. In particular, Corporations No. 1 and No. 2 were unwilling to make payments to Adelphia that would reduce the actual price per converter box provided for in the May purchase agreements because, among other things, such payments would erode those corporations' margin on any converter boxes sold to Adelphia.

117. Faced with the unwillingness of Corporations No. 1 and No. 2 to re-negotiate the terms of the converter box purchases, Adelphia proposed marketing support agreements to Corporations No. 1 and No. 2 in which no economic benefit would be exchanged - *i.e.*, circular, "wash" transactions. In particular, on or about October 20, 2000, TIMOTHY J. RIGAS, together with Brown and Werth, caused Adelphia to propose to representatives of Corporation No. 1 an agreement pursuant to which Adelphia would pay approximately $18 more per cable converter box than Adelphia was required to pay under the May 2000 purchase agreement, and, in return, Corporation No. 1 would promptly pay $18 per cable box back to Adelphia as marketing support." TIMOTHY J. RIGAS, Brown and Werth explained to the representatives of Corporation No. 1 that such an agreement would have no net economic effect, but would allow Adelphia to decrease its operating expenses and increase its EBITDA. In or about late October 2000, TIMOTHY J. RIGAS, Brown and Werth caused Adelphia to propose an identical agreement with Corporation No. 2.

c) The Marketing Support Agreements

118. On or about January 2, 2002, TIMOTHY J. RIGAS, together with Brown and Werth, caused Adelphia to enter into a "marketing support" agreement with Corporation No. 1. Pursuant to this agreement, Corporation No. 1 agreed to pay Adelphia $18,052,960 in marketing support in connection with digital converters already purchased by Adelphia in 2000 pursuant to the May 23, 2000 purchase agreement and, in exchange, Adelphia agreed to a retroactive price increase for the converters it had already purchased, in an identical amount. As TIMOTHY J. RIGAS, Brown and Werth well knew, these sham marketing support agreements lacked economic substance, had no legitimate business purpose, and were entered into for the sole purpose of artificially inflating Adelphia's EBITDA.

119. In order to conceal the fact that this marketing support agreement was a circular "wash" transaction with no economic substance, the "marketing support" agreement between Corporation No. 1 and Adelphia was memorialized in two separate documents, neither of which referenced or mentioned the other. These two documents were used to conceal the fact that the payments by Corporation No. 1 to Adelphia for "marketing support" were being immediately returned, as part of the same agreement, to Corporation No. 1 as a purported price increase. Accordingly, one contract was created to set up payments due from Corporation No. 1 to Adelphia for marketing support, and a separate document was created setting up payments from Adelphia to Corporation No. 1, in the

exact same amounts, refunding all of the marketing support payments.

120. On or about January 2, 2000, TIMOTHY J. RIGAS, together with Brown and Werth, caused Adelphia to enter into a "contract for spot telecasting and digital marketing support fees" (the "Spot Telecasting Contract") with Corporation No. 1. The Spot Telecasting Contract provided that Corporation No. 1 would pay Adelphia $5,600,000 in each quarter in marketing support fees. The Spot Telecasting Contract, although not executed by Brown until January 2, 2000, was falsely and fraudulently backdated to November 13, 2000, in order to ensure its effect on Adelphia's financial statements for the year 2000. In addition, the Spot Telecasting Contract provided that it applied retroactively to April 1, 2000, despite the fact that the first serious discussion of marketing support fees between Corporation No. 1 and Adelphia took place in late October 2000, and despite the fact that the May 23, 2000 purchase agreement between Adelphia and Corporation No. 1 made no mention of marketing support fees. Finally, the figure of $5,600,000 per quarter in marketing support payments provided for in the Spot Telecasting Contract was not based on any understanding that such a sum would actually be spent on marketing (and in fact represented a sum equal to almost twenty-five per cent of Adelphia's entire marketing budget in any given quarter) but was simply an amount Adelphia sought in order to inflate its EBITDA.

121. As set forth above, TIMOTHY J. RIGAS, together with Brown and Werth, agreed with representatives of Corporation No. 1 that, in order to

disguise the sham nature of the wash marketing support transaction, the return payments by Adelphia to Corporation No. 1 would be memorialized in a separate "letter agreement," (the Price Increase Letter"), dated January 2, 2001. The Price Increase Letter falsely and fraudulently represented that, as a result of cost increases to Corporation No. 1, it was increasing the price Adelphia would be required to pay for digital converters. In truth and in fact, Corporation No. 1 had not experienced such price increases, and the price increase memorialized in the Price Increase Letter represented the return by Adelphia of the "marketing support" payments agreed to by Corporation No. 1. In fact, the price increase established in Price Increase Letter was calculated to equal exactly the amount of "marketing support" payments agreed to by Corporation No. 1. Thus, the Price Increase Letter assured that the "marketing support" agreement would be a wash transaction, while concealing that fact from readers of either the Spot Telecasting Contract or the Price Increase Letter.

122. In or about March 2001, TIMOTHY J. RIGAS, together with Brown and Werth, based on similar understandings to those explained above, caused Adelphia to enter into a marketing support agreement with Corporation No. 2. Like the agreement between Adelphia and Corporation No. 1, the marketing support agreement with Corporation No. 2 was memorialized in two different documents, a "contract for spot telecasting and digital marketing support fees," and a "letter agreement" raising the price of digital converter boxes paid by Adelphia. In addition, these documents contained the same misleading misstatements about the reasons for the

price increase to Adelphia and the use of the marketing support payments by Adelphia. Both Spot Telecasting Contract and the Price Increase Letter between Adelphia and Corporation No. 2 provided that they were applicable beginning January 1, 2000, despite the fact that Adelphia did not raise the issue of marketing support with Corporation No. 2 until October 2000. In addition, the marketing support contract was misleadingly backdated to November 28, 2000, and the price increase letter was misleadingly backdated to December 29, 2000, despite the fact that neither document was executed before late March 2001.

d) Use of the Marketing Support Agreements to Artificially Inflate Adelphia's EBITDA

123. In or about early 2001, TIMOTHY J. RIGAS, together with Brown and Werth, directed Adelphia employees to record marketing support payments from Corporation No. 1 and Corporation No. 2 to Adelphia as a "contra-expense" to Adelphia's marketing costs in the books and records of Adelphia. This accounting treatment lowered the amount of Adelphia's recorded marketing expenses and, in turn, artificially inflated Adelphia's EBITDA.

124. In or about early 2001, TIMOTHY J. RIGAS, together with Brown and Werth, directed Adelphia employees to record as capital expenditures the payments owed by Adelphia to Corporation No. 1 and Corporation No. 2 pursuant to the price increase provisions of the sham marketing support agreements. By definition, capital expenditures are excluded from EBITDA. By causing such payments

to be recorded as capital expenditures on the books and records of Adelphia, TIMOTHY J. RIGAS, Brown and Werth artificially inflated Adelphia's EBITDA.

125. In or about early 2001, TIMOTHY J. RIGAS, together with Brown and Werth, caused Adelphia employees to record on the books and records of Adelphia at least approximately $34,400,000 in purported marketing support payments from Corporation No. 1 and Corporation No. 2 as contra-expenses for the year ending December 31, 2000. In addition, TIMOTHY J. RIGAS, Brown and Werth caused Adelphia employees to record at least approximately $34,400,000 in payments from Adelphia to Corporation No. 1 and Corporation No. 2 as capital expenditures for the same period. As a result, TIMOTHY J. RIGAS, Brown and Werth artificially inflated Adelphia's EBITDA for the year ending December 31, 2000 by at least approximately $34,400,000.

126. In or about early 2002, TIMOTHY J. RIGAS, together with Brown and Werth, directed Adelphia employees to record at least approximately $53,000,000 in sham marketing support payments from Corporation No. 1 and Corporation No. 2 for the year ending December 31, 2001, thereby inflating Adelphia's publicly disclosed EBITDA by that amount. In or about early 2002, TIMOTHY J. RIGAS, together with Brown and Werth, directed Adelphia employees to record at least approximately $7,300,000 in sham marketing support payments from Corporation No. 1 and Corporation No. 2 for the quarter ending March 31, 2002.

B. Misrepresentations Concerning "Basic Cable Subscribers"

127. At all relevant times, the number and growth rate of a cable operator's basic cable subscribers was widely considered to be an important measure of the company's financial condition and performance, in part because a company's basic subscriber base (as opposed to subscribers to pay channels and other services) provides a steady and predictable flow of subscription income.

128. At all relevant times, Adelphia publicly reported that it used the term "basic cable subscribers" to mean "a home with one or more television sets connected to a cable system."

129. By at least in or about the late 1990s, the growth of "basic cable subscribers" in the cable television industry had slowed, due to, among other things, the expansion of satellite television service and the maturation of cable markets. By in or about 2000, approximately one or two percentage points in basic subscriber growth per quarter was the industry average.

130. In or about early 2000, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, along with Brown and other Adelphia employees, became aware that the number and growth rate of Adelphia's basic subscriber numbers for the first quarter of 2000 would fail to meet Adelphia's predictions and industry averages. As JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and Brown well knew, even a relatively small adjustment to the overall "basic cable subscribers" could make a

negative growth figure positive, and put Adelphia's results in line with market expectations.

131. Thereafter, in response to the slow and/or negative growth of subscribers, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown and other Adelphia employees, engaged in a pattern and practice of fraudulently misrepresenting the number of Adelphia's "basic cable subscribers" in Adelphia's Forms 10-K, quarterly results press releases, quarterly results conference calls, and at "road show" presentations.

132. From in or about August 15, 2000 through on or about March 23, 2002, at the direction of TIMOTHY J. RIGAS and Brown, and with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, Adelphia employees fraudulently and misleadingly inflated the number of Adelphia's "basic cable subscribers" by (1) misleadingly including in its publicly reported number of "basic cable subscribers," categories of subscribers that were not "basic cable subscribers" as publicly reported by Adelphia; and (2) by failing to disclose that when new categories of subscribers were added to the number of "basic cable subscribers" for a given quarter, the numbers for the preceding twelve months were not adjusted to include those additional categories of subscribers. As a result, Adelphia's subscriber growth rate, which already had been inflated fraudulently, was inflated even further.

133. In particular, on or about May 15, 2000, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, who reviewed Adelphia's subscriber

statistics and reviewed and approved all of Adelphia's public disclosures, directed Adelphia employees, in its press release and conference call announcing its results for the first quarter of 2000, to fraudulently and misleadingly claim that Adelphia had 5,300,517 "basic cable subscribers," a growth rate of approximately 1.6 percent over the preceding twelve months. In order to inflate the number of "basic cable subscribers" disclosed on or about May 15, 2000, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees, included in the number of "basic cable subscribers" approximately 43,000 subscribers to cable services in Brazil and Venezuela provided by a company in which Adelphia held only a minority interest.

134. To compound the misrepresentation created by this baseless addition, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees, did not adjust the "basic cable subscriber" numbers for the preceding twelve months to include these Brazilian and Venezuelan subscribers, resulting in the misleading appearance of significant "basic cable subscriber" growth.

135. Similarly, on or about August 14, 2001, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, directed Adelphia employees, in Adelphia's press release and conference call announcing its results for the second quarter of 2001, fraudulently and misleadingly to claim that Adelphia had 5,672,225 "basic cable subscribers," a growth rate of approximately 1.0 percent over the preceding twelve months. In order to inflate the number of "basic

cable subscribers" disclosed on or about August 14, 2000, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees included in the "basic cable subscriber" number approximately 33,000 subscribers to Adelphia's internet service who did not subscribe to any Adelphia cable television service whatsoever. Also included were the subscribers in Brazil and Venezuela described above.

136. To compound the misrepresentation created by these baseless additions, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees, did not adjust the "basic cable subscriber" numbers for the preceding twelve months to include these internet-only subscribers in the preceding number of reported "basic cable subscribers," resulting in the misleading appearance of significant "basic cable subscriber" growth.

137. Similarly, on or about March 27, 2002, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, directed Adelphia employees, in Adelphia's press release and conference call announcing its results for the fourth quarter and year 2001, fraudulently and misleadingly claim that Adelphia had 5,810,253 "basic cable subscribers," a growth rate of approximately 0.5 percent over the preceding twelve months. In order to inflate the number of "basic cable subscribers" disclosed on or about March 27, 2002, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees included in the number of "basic cable subscribers"

approximately 60,000 subscribers to Adelphia's home security service who did not subscribe to any Adelphia cable television service whatsoever. Also included were the subscribers in Brazil and Venezuela and the internet-only subscribers described above.

138. To compound the misrepresentation created by these baseless additions, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees, did not adjust the "basic cable subscriber" numbers for the preceding twelve months to include these internet-only subscribers in the preceding number of reported "basic cable subscribers," resulting in the misleading appearance of significant "basic cable subscriber" growth.

C. Misrepresentations Concerning High-Speed Internet Subscribers

139. In or about November 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, along with Brown and other Adelphia employees, learned that Adelphia's high-speed internet subscriber base was substantially lower than market expectations. As JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and Brown well knew, by late 2001, cable investors placed great significance on the number of a cable company's subscribers to high-margin internet services.

140. On or about November 9, 2001, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, directed Adelphia employees, in Adelphia's quarterly results press release and quarterly results

conference call for the third quarter of 2001, to fraudulently and misleadingly represent that Adelphia had 315,104 high speed Internet subscribers.

141. In order to overstate the number of high-speed internet subscribers disclosed on or about November 13, 2001, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees, included in the number of Adelphia high-speed internet subscribers approximately 10,000 subscribers to high-speed internet service provided by Cable RFEs that were not owned or controlled by Adelphia.

142. To compound the misrepresentation created by this baseless addition, TIMOTHY J. RIGAS and Brown, with the knowledge and approval of JOHN J. RIGAS and MICHAEL J. RIGAS, and other Adelphia employees did not revise Adelphia's high-speed internet subscriber numbers for the preceding twelve months to include the subscribers added in November 2001 from the RFEs, resulting in the misleading appearance of a larger high-speed internet subscriber base.

D. Misrepresentations Concerning Progress in Rebuilding Cable Systems

143. Beginning in or about the late 1990s, in response to competition from digital satellite television services, telephone companies and other sources, many cable operators began to rebuild their systems to make them capable of providing such services as digital cable television, high-speed internet access service, video-on-demand and other

services. Because the internet is interactive, however, it requires a system of cables that can both send signals to customers (such as a television show), and receive signals from customers (such as data inputted into an internet search engine).

144. At all relevant times, traditional coaxial cable systems generally were not capable of providing the two-way transmission necessary for internet service. In order to provide two-way service on older, lower bandwith systems, it was necessary to "rebuild" the systems, using newer, high bandwith cable and transmission equipment. The rebuilding process, which requires re-laying miles of cable, was very costly.

145. At all relevant times, because of such modernization, rebuilding efforts typically absorbed a large proportion of a cable operator's resources. As a result, investors, analysts and other market participants considered the progress of a cable operator's rebuild efforts to be important. The higher the percentage of rebuild completion, the sooner the company would be relieved of the enormous expense of rebuilding. Moreover, the higher the percentage of rebuild completion, the higher the company's potential income from such new and high-margin services as digital cable and high-speed internet access.

146. At all relevant times, cable companies with high percentages of two-way-capable systems were more attractive to investors because (1) they had more ability to provide high-margin internet service; end (2) they.had less expensive rebuilding to do.

147. From in or about late 1999 through on or about March 28, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, along with Brown and .other Adelphia employees, engaged in a pattern and practice of fraudulently misrepresenting Adelphia's percentage of two-way-capable cable systems, and the corresponding percentage of systems requiring rebuilds.

148. At all relevant times, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and Brown were aware of the true extent of Adelphia's two-way-capable cable plant and progress in completing its rebuild, based on, among other things, Adelphia internal business records.

149. From in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown and other Adelphia employees acting at their direction, fraudulently and misleadingly inflated Adelphia's percentage of two-way-capable capacity above the percentages reported within Adelphia in numerous communications with the public, including quarterly results conference calls, equity road shows, and other disclosures.

150. From in or about 1999 through on or about March 28, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown and other Adelphia employees acting at their direction, presented to participants in road shows demonstrative aids that overstated Adelphia's percentage of two-way-capable cable plant by approximately 10 to 15 percentage points.

151. For example, in late 1999, Brown disclosed to road show participants a document indicating that 50 percent of Adelphia's systems were two-way-capable, when, in truth and in fact, as Brown well knew, only approximately 35 percent of Adelphia's systems were two-way-capable at that time. From in or about 1999 through in or about 2002, the fraudulent document used by Brown was used at hundreds of road show presentations by Brown and other Adelphia employees. This document was frequently revised to include numbers on the percentage of two-way-capable systems that were fraudulently inflated and inconsistent with Adelphia's internal reports regarding the percentage of two-way-capable cable plant and its progress in rebuilding that plant.

152. Similarly, on or about November 15, 2000, TIMOTHY J. RIGAS stated in a public conference call, which was transmitted to various locations in New York, New York and elsewhere, that approximately 60 percent of Adelphia's systems were "two-way" capable. On or about August 15, 2000, in another conference call, TIMOTHY J. RIGAS, told financial analysts that approximately 60 percent of Adelphia's systems had been rebuilt, when, in truth and in fact, as TIMOTHY J. RIGAS well knew, only approximately 50 percent of Adelphia's systems were two-way capable in August 2000.

E. Fraudulent Rigas Converter Transaction

153. From at least in or about 1998 through in or about May 2002, as a result of, among other things, the need to rebuild Adelphia's cable systems to make them two-way-capable, and the need to

purchase digital cable converter boxes, Adelphia had significant capital expenditures in every quarter. Because Adelphia was heavily leveraged and had limited liquidity under its credit agreements, securities analysts and investors closely watched Adelphia's capital expenditures for signs of material increases that might negatively affect the company.

154. In or about late 2001, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, along with Brown, Werth and other Adelphia employees, became aware that Adelphia's capital expenditures for the third quarter of the 2001 fiscal year were approximately $725 million, an increase of approximately $100 million over the previous year and above market expectations. TIMOTHY J. RIGAS, MICHAEL J. RIGAS, Brown and Werth, along with other Adelphia employees determined that, among other things, capital expenditures had increased because during the year Adelphia had purchased a large quantity of digital converter cable boxes.

155. In or about October 2001, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, along with Brown and other Adelphia employees, conceived a scheme to fraudulently and misleadingly under-represent to the public Adelphia's capital expenditures for the third quarter of 2001. As part of the scheme, TIMOTHY J. RIGAS and Brown directed Werth and other Adelphia employees to cause Adelphia to purport to sell more than 350,000 digital cable converter boxes and other electronic equipment, worth approximately $101 million, to Highland Holdings, L.P., an Other RFE with no cable business. Highland Holdings had no use for the converter boxes, and was chosen as the recipient of the boxes because its financial statements were not audited.

There was no business purpose for the transaction, and no expectation that Adelphia would be paid for the converter sale.

156. In or about October 2001, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown, Werth and other Adelphia employees, fraudulently and misleadingly caused Highland Holdings to record approximately $101 million in digital cable converters as an asset on Highland Holding's books, and caused Adelphia to remove those converters from its books. TIMOTHY J. RIGAS, MICHAEL J. RIGAS, together with Brown, Werth and other Aldelphia employees, further caused Adelphia fraudulently and misleadingly to remove the cost of the transferred converters, which Adelphia had purchased, from Adelphia's capital expenditures for the purpose of artificially decreasing Adelphia's publicly reported capital expenditures. Rather, Adelphia's books reflected an inter-company receivable from Highland Holdings in the amount of approximately $101 million.

157. In or about November 2001, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown, Werth and other Adelphia employees, caused Adelphia, in its Form 10-Q and in its press release and conference call announcing its quarterly results, to make false and misleading statements about its capital expenditures in the third quarter of 2001 in that it fraudulently understated the amount of its capital expenditures by approximately $101 million.

158. In or about December 2001, Werth created journal entries on Adelphia's books that reversed the sale of digital converters from Adelphia to Highland Holdings, L.P., for the purpose of

making Adelphia's books accurately reflect its true condition at the close of the year 2001. In or about January 2002, when Brown was made aware of those reversing journal entries, Brown directed Werth to create new entries which purported to sell the converters and electronic equipment to Highland Holdings, effective December 31, 2001. These new journal entries directed by Brown ensured that the digital converters continued to appear to be an asset of Highland Holdings, L.P., and ensured that the associated capital expenditures would not appear an Adelphia's books and records for 2001.

XI. FRAUD IN CONNECTION WITH ADELPHIA'S COMPLIANCE WITH THE TERMS OF ITS BANK LOANS AND DEBT SECURITIES

A. Misrepresentations Concerning Bank Debt

159. As set forth in paragraphs 29-30, above, the agreements creating Adelphia's syndicated, secured credit facilities required it to make quarterly reports to its lenders regarding each borrowing group's compliance with the conditions of the credit facilities, and, in particular, its ratio of cash flow to indebtedness.

160. From at least in or about 1999 through in or about March 23, 2002, TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY, along with Brown and other Adelphia employees, prepared and submitted to lenders loan compliance reports that fraudulently misrepresented, among other things, the cash flow of the reporting entities.

161. As set forth in paragraphs 31-35, above, Adelphia's secured bank borrowings were made through "borrowing groups" of its subsidiaries. At the close of each quarter, Brown and other Adelphia employees, along with TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY, would meet to review the financial statements of each borrowing group and to prepare the required loan compliance report.

162. Where an Adelphia borrowing group was not in compliance with its loan covenants, and in many cases where a borrowing group was in compliance but could obtain better loan rates by reporting a more favorable ratio of cash flow to indebtedness, TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY, together with Brown and other Adelphia employees, routinely made one or more fraudulent adjustments to the financial information disclosed in the required loan compliance documents.

163. Such fraudulent adjustments to financial information submitted to banks took a number of forms. Often, TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, would record revenue due from affiliates, without any factual basis, and direct Adelphia employees to credit such revenue to a particular borrowing group so that it would be in compliance. At other times, TIMOTHY J. RIGAS and MULCAHEY would direct Adelphia employees either to lower the borrowing group's actual costs or increase its actual revenues, again with no factual basis. Such fraudulent adjustments had the effect of increasing the cash flow for a particular borrowing group so as to bring it into compliance with its loan agreements.

B. Misrepresentations Concerning Notes Issued to the Public

164. As set forth in paragraph 40, above, the indentures creating Adelphia's publicly issued notes required it to make quarterly reports to the holders of its notes regarding its compliance with the provisions of the indentures.

165. From at least in or about 2001 through in or about May 2002, TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, caused Adelphia to issue certifications of compliance with the indentures when, in numerous cases, Adelphia had not even undertaken the financial calculations necessary for determining whether Adelphia was actually in compliance.

166. For example, on or about August 31, 2001, Adelphia filed a certification (actually due on August 19, 2001) reporting that it was in compliance with the financial conditions of its public indentures, when it had not undertaken the financial calculations necessary to determine whether it was in compliance. In fact, in every quarter of 2001, Adelphia failed to comply with certain material financial conditions of its public indentures, including conditions relating to the maximum leverage Adelphia was permitted.

XII. FRAUD IN CONNECTION WITH RIGAS FAMILY SELF-DEALING

167. As set forth in paragraphs 7-11, above, at all relevant times, JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS, by virtue of their positions as the most senior executive officers of Adelphia, controlled Adelphia and its assets. Among

other things, they had the ability to cause funds to be disbursed from the Adelphia CMS.

168. From at least in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS, in violation of the fiduciary duties, used Adelphia assets for their own purposes and those of other members of the Rigas Family, without reimbursement to Adelphia, without the authorization of the Adelphia Board of Directors, and without disclosing such use to the Outside Directors or to the public.

A. Undisclosed Payments from Adelphia to JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and Other Members of the Rigas Family

169. From at least in or about 1999 through in or about April 2002, Adelphia advanced millions of dollars in cash to JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, in excess of their publicly disclosed compensation. In addition, Adelphia advanced substantial amounts of cash to other members of the Rigas Family. Those advances were executed through the Adelphia CMS, either by transferring funds directly from Adelphia to a member of the Rigas Family, or by transferring funds from Adelphia to an RFE, and then subsequently transferring such funds from the RFE to the recipient. From in or about 1999 through in or about April 2002, at least the following amounts of cash were advanced from Adelphia to members of the Rigas Family, directly or indirectly, as set forth below:

RIGAS FAMILY MEMBER	APPROXIMATE AMOUNT OF CASH ADVANCES
JOHN J. RIGAS	$46,457,411
TIMOTHY J. RIGAS	$1,053,707
MICHAEL J. RIGAS	$1,000,849
Other Rigas Family Members	$3,813,238
TOTAL	$52,325,205

170. At all relevant times, JOHN J. RIGAS maintained bank accounts at a branch of the Bank of New York, based in New York, New York.

171. In or about early 2001, TIMOTHY J. RIGAS advised MICHAEL C. MULCAHEY that JOHN J. RIGAS had been spending unacceptably large amounts of Adelphia funds. In response, TIMOTHY J. RIGAS instructed MULCAHEY that requests for disbursements of more than a total of approximately $1,000,000 per month to JOHN J. RIGAS would thereafter require the approval of TIMOTHY J. RIGAS.

172. From at least in or about early 2001 through in or about early 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY caused Adelphia to make cash payments to JOHN J. RIGAS in the amount of at least approximately $1,000,000 per month. Those cash payments were made through the CMS, and were wire transferred to the account of JOHN J. RIGAS at the Bank of New York. Those cash advances were not presented to or authorized by the Adelphia Board of Directors, and were not disclosed to the Outside Directors or to the public. During that period, at least approximately

$12,000,000 was wire transferred from the CMS to the personal bank account of JOHN J. RIGAS at the Bank of New York.

173. On or about April 30, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with Brown, caused Adelphia to file an amended annual report on Form 10-K, which falsely understated the total amount of compensation to JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and another member of the Rigas Family by failing to include the cash advances set forth in paragraph 169, above.

B. Adelphia's Undisclosed Payments of Margin Calls Against Rigas Family Loans

174. From on or about December 31, 1998 through on or about June 2, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS, together with other members of the Rigas Family, caused Adelphia to issue at least approximately 197,000,000 shares of Class A common stock, resulting in an increase of more than approximately 700 percent in the number of such shares outstanding from approximately 31,258,843 on or about December 31, 1998, to approximately 228,600,000 on or about June 2, 2002. As set forth in paragraph 7, above, the majority of Adelphia's Class A common stock was owned and controlled by persons other than members of the Rigas Family.

175. During that same period, JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS, together with other members of the Rigas Family, caused Adelphia to issue at least approximately 14,000,000 shares of Class B common

stock. As noted above, the issuance of such stock enabled the Rigas Family to maintain control over Adelphia, notwithstanding the issuance of millions of shares of Class A common stock to third parties.

176. In order to finance the Rigas Family purchases of Adelphia securities, JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS, together with other members of the Rigas Family, caused at least approximately 23,200,000 shares of Adelphia common stock that was owned and controlled by the Rigas Family to be pledged as collateral for margin loans, and used the proceeds of such loans to pay for such securities.

177. At all relevant times, Highland Preferred Communications 2001, LLC; Highland Communications; Highland Holdings II, G.P.; and Highland Preferred Communications and Doris Holdings, L.P. were entities owned and controlled by JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, together with other members of the Rigas Family.

178. At all relevant times, Highland Preferred Communications 2001, LLC maintained a brokerage account at Deutsche Bank, which was associated with a margin loan account. At all relevant times, Highland Communications maintained a brokerage account at Salomon Smith Barney, which was associated with a margin loan account. At all relevant times, Highland Holdings II, G.P. maintained a brokerage account at Goldman Sachs & Co., which was guaranteed by the account of Doris Holdings, L.P. At all relevant times, Highland Preferred Communications was the borrower on a loan from Bank of America that was

secured by Adelphia Class A common stock. The four loans described above are referred to collectively as the "Rigas Family Stock Loans."

179. At all relevant times, under the terms of each of the Rigas Family Stock Loans, the Rigas Family was required to pay interest on outstanding loan balances, and to meet margin requirements with respect to the Adelphia Class A common stock pledged as collateral. Under such margin requirements, if the market value of the Adelphia common stock declined, the lender could make a "margin call" against the Rigas Family. In the event of a margin call, the Rigas Family would be required to provide additional cash or securities to increase the value of the lender's collateral. If the Rigas Family did not satisfy the margin call, the lender could sell the Adelphia common stock pledged to secure the loan on the open market, and use the proceeds of that sale to reduce the balance of the loan.

180. From in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS, together with other members of the Rigas Family, caused Adelphia Class A common stock to be pledged as collateral in connection with each of the Rigas Family Stock Loans.

181. As of on or about December 10, 2001, the Rigas Family had pledged a total of at least approximately 23,040,877 shares of Adelphia Class A common stock as collateral for aggregate loan balances on the Rigas Family Stock Loans of at least approximately $188,750,000, as set forth below:

LENDER	BORROWER	APPROXIMATE NUMBER OF SHARES PLEDGED	APPROXIMATE LOAN BALANCE
Bank of America	Highland Preferred Communications	4,147,999	$47,000,000
Deutsche Bank	Highland Preferred Communications 2001, LLC	5,285,963	$50,050,000
Goldman Sachs	Highland Holdings II, G.P.; Doris Holdings, L.P. (guarantor)	5,398,151	$30,100,000
Salomon Smith Barney	Highland Communications	8,208,764	$61,600,000

182. From in or about July 2000 through in or about May 2002, the market price for Adelphia common stock declined steadily from more than approximately $40.00 per share in or about July 2000 to less than approximately $6.00 per share in or about mid-May 2002. As a result of the decline in the market price for Adelphia's common stock, a series of margin calls was made against the Rigas Family Stock Loans, as set forth below:

a. From on or about July 31, 2000 through on or about April 1, 2002, Bank of America made approximately 6 margin calls on the Highland Preferred Communications loan account, for a total of approximately $52,089,668.

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b. From on or about September 27, 2000 through on or about May 9, 2002, Goldman Sachs made a total of approximately 27 margin calls on the Highland Holdings II, G.P. brokerage account, for a total of approximately $71,109,178.

c. From on or about July 11, 2001 through on or about May 10, 2002, Salomon Smith Barney made a total of approximately 28 margin calls on the Highland Communications .brokerage account, for a total of approximately $78,673,145.

d. From on or about March 28, 2002 through on or about April 3, 2002, Deutsche Bank made a total of approximately 4 margin calls on the Highland Preferred Communications 2001, LLC brokerage account, for a total of approximately $50,285,185.

183. From in or about July 2000 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, caused Adelphia to pay a total of at least approximately $252,157,176 to satisfy the margin calls described above.

184. The funds used to pay those margin calls were wire transferred from the Adelphia CMS to the respective lenders. For example, the following payments made to satisfy margin calls against the Goldman Sachs brokerage account of Highland Holdings II, G.P. were made through interstate wire transfers from Adelphia CMS accounts held at First Union in Pensacola, Florida to a Goldman Sachs account held at J.P. Morgan Chase Bank ("Chase") in New York, New York, as set forth below:

APPROXIMATE DATE	APPROXIMATE AMOUNT	TRANSFEROR ACCOUNT
September 27, 2000	$8,250,000	Highland Holdings
August 17, 2001	$1,700,000	Adelphia
August 23, 2001	$2,700,000	Adelphia
August 29, 2001	$2,100,000	Adelphia
September 18, 2001	$5,000,000	Adelphia
September 20, 2001	$500,000	Adelphia
September 21, 2001	$5,000,000	Adelphia
September 25, 2001	$3,500,000	Adelphia
September 27, 2001	$1,750,000	Adelphia
October 1, 2001	$4,500,000	Adelphia
October 3, 2001	$2,500,000	Adelphia
November 15, 2001	$150,000	Adelphia
November 19, 2001	$75,000	Adelphia
February 21, 2002	$2,352,592	Highland Holdings II
February 22, 2002	$798,926	Highland Holdings II
March 28, 2002	$6,359,647	Highland Holdings II
March 29, 2002	$3,886,669	Highland Holdings II
April 2, 2002	$3,934,629	Highland Holdings II
April 3, 2002	$2,786,446	Highland Holdings II
April 4, 2002	$1,705,815	Highland Holdings II

APPROXIMATE DATE	APPROXIMATE AMOUNT	TRANSFEROR ACCOUNT
April 5, 2002	$2,245,631	Highland Holdings II
April 12, 2002	$4,296,928	Highland Holdings II
April 15, 2002	$2,180,853	Highland Holdings II
April 22, 2002	$1,554,668	Highland Holdings II
April 23, 2002	$971,667	Highland Holdings II
April 29, 2002	$43,185	Highland Holdings II
May 9, 2002	$266,522	Highland Holdings II
TOTAL	$71,109,178	

185. The Rigas Family did not reimburse Adelphia for the funds used to pay the margin calls described above. In addition, Adelphia's payment of those margin calls substantially increased the amount of Adelphia's liabilities under the Co-Borrowing Agreements.

186. The use of at least approximately $252,157,176 in Adelphia funds to satisfy margin calls against the Rigas Family Stock Loans was not presented to or authorized by the Adelphia Board of Directors, was not disclosed to the Outside Directors, and was not disclosed to the public.

187. At all relevant times, based on the fact that members of the Rigas Family were the principal owners of Adelphia, and exercised control over

Adelphia's affairs, investors and analysts generally considered the Rigas Family's financial situation to be material to the market for Adelphia's securities. In particular, investors and analysts were concerned that a decline in the market price of Adelphia's common stock would have a material adverse effect on the Rigas Family's financial situation. As a result, the Rigas Family's ability to provide financial support to Adelphia would be adversely affected by such a decline.

188. By at least on or about December 17, 2001, based on Adelphia's SEC filings, the public was aware that the Rigas Family had pledged a large amount of Adelphia common stock in connection with margin loans. As the market price for Adelphia's stock declined throughout 2001 and 2002, investors and analysts expressed concern that the Rigas Family's financial situation would be adversely affected by substantial margin calls against the Rigas Family Stock Loan Accounts.

189. On various occasions in or about 2001 and 2002, investors and analysts requested information from TIMOTHY J. RIGAS and Brown concerning the likelihood of substantial margin calls against the Rigas Family's Adelphia common stock holdings.

190. For example, on or about May 2, 2002, during a meeting held at the offices of Moody's at 99 Church Street in New York, New York, a representative of Moody's asked TIMOTHY J. RIGAS for information about the risk that margin calls would be made against the Rigas Family's Adelphia common stock holdings. In response, TIMOTHY J. RIGAS made false and misleading

statements that led the Moody's representative to believe that payments of the Rigas Family's margin had not increased Adelphia's liabilities.

C. Rigas Family Use of Adelphia Corporate Aircraft

191. At all relevant times, Adelphia maintained and operated approximately three airplanes (the "Adelphia Airplanes"). The Adelphia Airplanes were operated from an airport in Wellsville, New York. Adelphia paid all maintenance costs for the Adelphia Airplanes, including the salaries of approximately seven full-time pilots and various other employees.

192. From at least in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, and MICHAEL J. RIGAS, and other members of the Rigas Family, routinely used the Adelphia Airplanes for personal travel. The cost of the Rigas Family's personal travel on the Adelphia Airplanes was paid by Adelphia. Adelphia was not reimbursed by the Rigas Family for that cost.

193. The Rigas Family's use of the Adelphia Airplanes for personal travel without reimbursement to Adelphia was not presented to or authorized by the Adelphia Board of Directors, was not disclosed to the Outside Directors, and was not disclosed to the public.

D. The Golf Course

194. From at least in or about June 2001 through in or about May 2002, JOHN J. RIGAS and TIMOTHY J. RIGAS caused Adelphia to begin construction of a golf course and club on a parcel of approximately 830 acres of land located near

Coudersport, Pennsylvania. Of the 830 acres of land on which the golf facilities were located, approximately 169 acres were owned by an Adelphia subsidiary. The remaining land was owned and controlled, directly or indirectly, by JOHN J. RIGAS.

195. From in or about March 2000 through in or about May 2002, JOHN J. RIGAS and TIMOTHY J. RIGAS caused approximately $13,000,000 of Adelphia funds to be spent on equipment, development and construction costs for the golf facilities. The estimated cost to complete the golf facilities as planned was at least approximately $40,000,000. Adelphia did not execute any written leases or make any lease payments for use of the portion of the 830 acres owned and controlled by JOHN J. RIGAS.

196. The use of Adelphia's funds and assets to construct golf facilities on land primarily owned by JOHN J. RIGAS was not presented to or authorized by Adelphia's Board of Directors, and was not disclosed to the Outside Directors or to the public.

197. From in or about 2000 through in or about May 2002, JOHN J. RIGAS and TIMOTHY J. RIGAS falsely represented to certain of the Outside Directors that TIMOTHY J. RIGAS was paying for the construction of the golf facilities with his personal funds when, as JOHN J. RIGAS and TIMOTHY J. RIGAS well knew, they and their co-conspirators caused Adelphia to pay for such construction.

THE CONSPIRACY

198. From in or about 1999, up to and including in or about May 2002, in the Southern

District of New York and elsewhere, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, the defendants, together with James R. Brown, Timothy A. Werth and others known and unknown, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together and with others to commit offenses against the United States, to wit, violations of Title 15, United States Code, Sections 78j(b) , 78m(b)(2)(A), 78m(b)(5) and 78ff; Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.13b2-1; and Title 18, United States Code, Sections 1343, 1344 and 1346.

OBJECTS OF THE CONSPIRACY

Securities Fraud

199. It was a part and object of the conspiracy that JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, Werth and others known and unknown, unlawfully, willfully and knowingly, directly and indirectly, by the use of means and instrumentalities of interstate commerce, and of the mails, and of facilities of national securities exchanges, would and did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business

which operated and would operate as a fraud and deceit upon the purchaser and seller, all in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

Wire Fraud

200. It was a further part and object of the conspiracy that JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, Werth and others known and unknown, unlawfully, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, to wit, a scheme and artifice, among other things, to (a) deprive Adelphia Communications Corp. ("Adelphia") and its shareholders of the intangible right to the honest services of Adelphia directors and officers; (b) violate the fiduciary and other duties of Adelphia directors, officers and employees to Adelphia and its shareholders; and (c) obtain Adelphia's money and property, would and did transmit and cause to be transmitted by means of wire communications in interstate and foreign commerce, writings, signs, signals, pictures and sounds for the purposes of executing such scheme and artifice, all in violation of Title 18, United States Code, Sections 1343 and 1346.

False Statements In Sec Filings

201. It was a further part and object of the conspiracy that JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, Werth and

others known and unknown, unlawfully, willfully and knowingly, in applications, reports, and documents required to be filed under the Securities Exchange Act of 1934 and the rules and regulations thereunder, would and did make and cause to be made statements which were false and misleading with respect to material facts, in violation of Title 15, United States Code, Section 78ff.

False Books And Records

202. It was a further part and object of the conspiracy that JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, Werth and others known and unknown, unlawfully, willfully and knowingly, would and did, directly and indirectly, falsify and cause to be falsified books, records, and accounts subject to Section 13(b)(2) of the Securities Exchange Act of 1934, to wit, books, records and accounts of Adelphia, an issuer with a class of securities registered pursuant to the Securities Exchange Act of 1934, which Adelphia was required to make and keep in reasonable detail, accurately and fairly reflecting the transactions and dispositions of the assets of Adelphia, in violation of Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(5) and 78ff, and Title 17, Code of Federal Regulations, Section 240.13b2-1.

Bank Fraud

203. It was a further part and object of the conspiracy that JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown and others known and unknown, unlawfully, willfully and knowingly, would and did execute, and attempt to

execute, a scheme and artifice to defraud a financial institution, and to obtain moneys, funds, credits, assets, securities and other property owned by, and under the custody and control of, a financial institution whose deposits were insured by the Federal Deposit Insurance Corporation, means of false and fraudulent pretenses, representations and promises, all in violation of Title 18, United States Code, Sections 1344.

MEANS AND METHODS

204. Among the means and methods by which JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, Werth and their co-conspirators, would and did carry out the conspiracy were the following:

a. The defendants and their co-conspirators caused Adelphia employees to make false and misleading statements in documents filed with the SEC concerning, among other things, the amount of Adelphia's joint and several liabilities under the Co-Borrowing Facilities;

b. The defendants and their co-conspirators made false and misleading statements to investors, securities analysts, credit rating agencies, other market participants and the public concerning, among other things, Adelphia's efforts to reduce its financial leverage;

c. The defendants and their co-conspirators caused Adelphia to issue securities to entities owned and controlled by them and other members of the Rigas Family;

d. The defendants and their co-conspirators caused Adelphia employees to create fictitious, backdated documents, and to make false and fraudulent entries in Adelphia's books and records, concerning the sale of Adelphia securities to the Rigas Family;

e. The defendants and their co-conspirators made false and misleading statements to various credit rating agencies in order to induce them not to lower the credit ratings assigned to Adelphia securities;

f. The defendants and their co-conspirators caused Adelphia to enter into sham transactions with affiliates of Adelphia, involving the payment of management fees and debt placement fees, the purchase and sale of equipment and other matters, for the sole purpose of fraudulently manipulating Adelphia's financial condition and results, including, among other things, artificially inflating Adelphia's EBITDA;

g. The defendants and their co-conspirators caused Adelphia to enter into sham transactions with unaffiliated third parties, involving the purchase and sale of equipment, the payment of marketing support fees and other matters, for the sole purpose of fraudulently manipulating Adelphia's financial condition and results, including, among other things, artificially inflating Adelphia's EBITDA;

h. The defendants and their co-conspirators caused Adelphia's books and records to be falsified by, among other things, improperly recording revenues, expenses and other items;

i. The defendants and their co-conspirators provided false and misleading information concerning Adelphia's business, financial condition, performance and other matters to outside auditors, financial institutions, the SEC, investors, securities analysts, credit rating agencies and other market participants, and to the public;

j. The defendants and their co-conspirators caused Adelphia to make material misrepresentations of fact concerning matters relating to Adelphia, including its business, financial condition and performance, in press releases, public conference calls, meetings with investors, securities analysts and other market participants, and in other communications with the public;

k. The defendants and their co-conspirators transmitted and caused to be transmitted by means of wire communications in interstate and foreign commerce, press releases, SEC filings, public conference calls, electronic mail messages, telephone calls and other matters, and otherwise used means and instrumentalities of interstate commerce, and of the mails, to disseminate false and misleading information to the public;

l. The defendants and their co-conspirators falsified Adelphia's books and records by, among other things, making baseless additions to the number of Adelphia's basic cable subscribers, high-speed internet subscribers and other statistics;

m. The defendants and their co-conspirators made misrepresentations concerning the number and growth of Adelphia's basic cable

subscribers in SEC filings, press releases and other communications with the public;

n. The defendants and their co-conspirators made misrepresentations concerning the number of Adelphia's high-speed internet service subscribers in press releases and other communications with the public;

o. The defendants and their co-conspirators made misrepresentations concerning Adelphia's progress in completing the rebuild of its cable systems in public conference calls and other communications with the public;

p. The defendants and their co-conspirators made misrepresentations concerning other matters relating to Adelphia, including its business, financial condition and performance, in press releases, public conference calls, meetings with investors, securities analysts and other market participants, and in other communications with the public;

q. The defendants and their co-conspirators caused Adelphia to submit false and misleading compliance reports, and to make other false and misleading statements, to banks and holders of Adelphia's corporate debt;

r. The defendants and their co-conspirators caused Adelphia to engage in sham transactions with affiliates for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports;

s. The defendants and their co-conspirators caused Adelphia to record false and

misleading entries in its books and records for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports;

t. The defendants caused Adelphia and certain subsidiaries to enter into fraudulent securities transactions, in which Adelphia and/or the Rigas Family received securities without paying full compensation for such securities;

u. The defendants and their co-conspirators caused material amounts of Adelphia funds and other assets to be used for the benefit of themselves and other members of the Rigas Family, and caused Adelphia to enter into contracts and transactions with entities owned and controlled by them, without required approval of Adelphia's Board of Directors or shareholders;

v. The defendants made false and misleading statements to the Outside Directors in connection with contracts and transactions involving the Rigas Family and entities owned and controlled by them;

w. The defendants caused Adelphia to enter into contracts and transactions, and to modify existing contracts and transactions, which benefitted the Rigas Family at the expense of Adelphia; and

x. The defendants and their co-conspirators used the means and instrumentalities of interstate and foreign commerce and the mails, and the facilities of national securities exchanges, to carry out the scheme to defraud.

OVERT ACTS

205. In furtherance of the conspiracy, and to effect the illegal objects thereof, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, and their co-conspirators, committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. On or about March 30, 2000, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release announcing Adelphia's results for the fourth quarter of 1999, which was distributed throughout the United States, including in New York, New York;

b. In or about March 2000, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to begin construction of a golf course and club on a parcel of land located near Coudersport, Pennsylvania that was primarily owned by JOHN J. RIGAS;

c. On or about May 15, 2000, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release announcing Adelphia's results for the first quarter of 2000, which was distributed throughout the United States, including in New York, New York;

d. On or about August 14, 2000, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release announcing Adelphia's results for the second quarter of 2000, which was distributed

throughout the United States, including in New York, New York;

e. On or about November 15, 2000, TIMOTHY J. RIGAS stated in a public conference call, which was transmitted to various locations in New York, New York and elsewhere, that approximately 60 percent of Adelphia's systems were "two-way" capable;

f. On or about November 14, 2000, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release announcing Adelphia's results for the third quarter of 2000, which was distributed throughout the United States, including in New York, New York;

g. On or about January 17, 2001, MICHAEL J RIGAS executed agreements between Adelphia and Highland 2000, L.P. concerning the purchase and sale of Adelphia securities;

h. On or about April 2, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release announcing Adelphia's results for the fourth quarter and full year of 2000, which was distributed throughout the United States, including in New York, New York;

i. On or about May 14, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release announcing Adelphia's results for the first quarter of 2001, which was distributed throughout the United States, including in New York, New York;

j. On or about August 14, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release announcing Adelphia's results for the second quarter of 2001, which was distributed throughout the United States, including in New York, New York;

k. On or about August 31, 2001, TIMOTHY J. RIGAS caused Adelphia to file a certification concerning its compliance with the financial conditions of its public indentures;

l. On or about September 18, 2001, JOHN 5. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MULCAHEY caused approximately $5,000,000 to be wire transferred from First Union in Florida to Chase in New York, New York;

m. In or about the quarter ending September 30, 2001, TIMOTHY J. RIGAS directed Adelphia employees to credit Adelphia with in excess of $1.5 million in management fees from certain affiliates of Adelphia;

n. On or about October 1, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MULCAHEY caused approximately $4,500,000 to be wire transferred from First Union in Florida to Chase in New York, New York;

o. On or about November 9, 2001, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS caused Adelphia to issue a press release announcing Adelphia's results for the third quarter of 2001, which was distributed throughout the United States, including in New York, New York;

p. In or about January 2002, TIMOTHY J. RIGAS and MULCAHEY prepared certain notices addressed to Bank of Montreal, which were backdated to October 22, 2001;

q. On or about January 18, 2002, at 99 Church Street in New York, New York, TIMOTHY J. RIGAS participated in a meeting with representatives of Moody's;

r. On or about March 27, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MULCAHEY caused Adelphia to issue a press release reporting its results for the fourth quarter and full year 2001;

s. On or about March 28, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MULCAHEY caused approximately $6,359,647 to be wire transferred from First Union in Florida to Chase in New York, New York;

t. On or about March 29, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MULCAHEY caused approximately $3,886,669 to be wire transferred from First Union in Florida to Chase in New York, New York;

u. In or about April 2002, TIMOTHY J. RIGAS and MULCAHEY prepared certain receipts, which purported to acknowledge the receipt, on or about October 22, 2001, by Adelphia Communications Corp. from Highland 2000, L.P., of approximately $423,375,076 in immediately available funds; and

v. On or about April 12, 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J.

RIGAS and MULCAHEY caused approximately $4,296,928 to be wire transferred from First Union in Florida to Chase in New York, New York.

(Title 18, United States Code, Section 371).

COUNTS TWO THROUGH SIXTEEN

(Securities Fraud)

The Grand Jury further charges:

206. The allegations contained in paragraphs 1-197 and 204-05 of this Indictment are repeated and realleged as if fully set forth herein.

207. From in or about 1999, up to and including in or about May 2002, in the Southern District of New York and elsewhere, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, the defendants, unlawfully, willfully and knowingly, directly and indirectly, by the use of means and instrumentalities of interstate commerce, and of the mails, and of facilities of national securities exchanges, would and did use and employ, in connection with the purchase and sale of securities, to wit, the securities set forth below, manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and

deceit upon purchasers and sellers of such securities as set forth below:

COUNT	SECURITY
TWO	Adelphia Class A Common Stock
THREE	Adelphia 9.875% Senior Debentures due 3/1/05
FOUR	Adelphia 9.50% Senior Notes due 2/15/04
FIVE	Adelphia 9.875% Senior Notes due 3/1/07
SIX	Adelphia 10.50% Senior Notes due 7/15/04
SEVEN	Adelphia 9.25% Senior Notes due 10/1/02
EIGHT	Adelphia 8.375% Senior Notes due 2/1/08
NINE	Adelphia 8.125% Senior Notes due 7/15/03
TEN	Adelphia 7.50% Senior Notes due 1/15/09
ELEVEN	Adelphia 7.75% Senior Notes due 1/15/04
TWELVE	Adelphia 7.875% Senior Notes due 5/1/09
THIRTEEN	Adelphia 9.375% Senior Notes due 11/15/09
FOURTEEN	Adelphia 10.875% Senior Notes due 10/1/10
FIFTEEN	Adelphia 10.25% Senior Notes due 6/15/11

COUNT	SECURITY
SIXTEEN	Adelphia 10.25% Senior Notes due 11/1/06

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; Title 18, United States Code, Section 2).

COUNTS SEVENTEEN THROUGH TWENTY-ONE

(Wire Fraud)

The Grand Jury further charges:

208. The allegations contained in paragraphs 1-197 and 204-05 of this Indictment are repeated and realleged as if fully set forth herein.

209. On or about the dates set forth below, in the Southern District of New York and elsewhere, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, the defendants, unlawfully, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, to wit, a scheme and artifice, among other things, to (a) deprive Adelphia and its shareholders of the intangible right to the honest services of Adelphia directors and officers; (b) violate the fiduciary and other duties of Adelphia directors and officers to Adelphia and its shareholders; and (c) obtain Adelphia's money and property, would and did transmit and cause to be transmitted by means of wire communications in interstate and foreign commerce, writings, signs,

signals, pictures and sounds for the purposes of executing such scheme and artifice, to wit, the defendants caused Adelphia to make the wire transfers set forth below:

COUNT	APPROXIMATE DATE	APPROXIMATE AMOUNT	WIRE TRANSMISSION
SEVENTEEN	September 18, 2001	$5,000,000	Wire transfer from First Union in Florida to Chase in New York, New York
EIGHTEEN	October 1, 2001	$4,500,000	Wire transfer from First Union in Florida to Chase in New York, New York
NINETEEN	March 28, 2002	$6,359,647	Wire transfer from First Union in Florida to Chase in New York, New York
TWENTY	March 29, 2002	$3,886,669	Wire transfer from First Union in Florida to Chase in New York, New York
TWENTY-ONE	April 12, 2002	$4,296,928	Wire transfer from First Union in Florida to Chase in New York, New York

(Title 18, United States Code, Sections 1343, 1346 and 2).

COUNTS TWENTY-TWO THROUGH TWENTY-THREE

(Bank Fraud)

The Grand Jury further charges:

210. The allegations contained in paragraphs 1-197 and 204-05 of this Indictment are repeated and realleged as if fully set forth herein.

211. On or about the dates set forth below, in the Southern District of New York and elsewhere, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, the defendants, unlawfully, willfully and knowingly, would and did execute, and attempt to execute, a scheme and artifice to defraud a financial institution, and to obtain moneys, funds, credits, assets, securities and other property owned by, and under the custody and control of, a financial institution whose deposits were insured by the Federal Deposit Insurance Corporation, by means of false and fraudulent pretenses, representations and promises, to wit, the defendants falsely represented that the borrowers on the credit agreements set forth below were in compliance with certain material terms of those credit agreements:

COUNT	APPROXIMATE DATE	CREDIT AGREEMENT
TWENTY-TWO	April 14, 2000 through May 2002	$2,250,000 Credit Agreement dated April 14, 2000 among Century Cable Holdings, LLC and other Adelphia affiliates, as borrowers, and Chase Manhattan Bank, Bank of America, Bank of New York, CIBC, Citibank, First Union National Bank, Fleet National Bank, Mellon Bank, national City Bank of Pennsylvania, SunTrust Bank, U.S. Bank and other lenders, including numerous financial institutions located in New York, New York
TWENTY-THREE	September 28, 2001 through May 2002	$2,030,000,000 Credit Agreement among Olympus Cable Holdings, LLC and other Adelphia affiliates, as borrowers, and Fleet National Bank, Bank of America, Citicorp, First Union National Bank, Bank of New York and other lenders, including numerous financial institutions located in New York, New York

(Title 18, United States Code, Sections 1344 and 2.)

FORFEITURE ALLEGATION

The Grand Jury further charges:

212. The allegations contained in paragraphs 1-197 and 204-05 of this Indictment are repeated and realleged as if fully set forth herein.

213. As the result of committing one or more of the foregoing securities frauds, wire frauds, bank

frauds or conspiracies to commit said offenses, as alleged in Counts One through Twenty-Four of this Indictment, JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, the defendants, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of such offenses, including but not limited to a sum of money equal to at least $2,533,000,000 in United States currency, representing the amount of proceeds obtained as a result of the securities fraud, wire fraud and bank fraud offenses and conspiracy to commit said offenses, for which the defendants are jointly and severally liable.

SUBSTITUTE ASSET PROVISION

214. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

f. it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property.

(Title 18, United States Code, Sections 981, 1343, 1344, 1346, and 2; Title 28, United States Code, Section 2461; Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5)

D. FOREPERSON

JAMES B. COMEY
United States Attorney

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No. 07-494

FILED
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SUPREME COURT, U.S.

In the Supreme Court of the United States

TIMOTHY J. RIGAS AND JOHN J. RIGAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government was required to prove that petitioners had violated Generally Accepted Accounting Principles, or to call an expert accounting witness, in order to convict them of securities fraud and conspiring to commit securities fraud.

2. Whether petitioners' bank fraud convictions require reversal under *Yates* v. *United States*, 354 U.S. 298 (1957).

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In the Supreme Court of the United States

No. 07-494

TIMOTHY J. RIGAS AND JOHN J. RIGAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 490 F.3d 208.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2007. A petition for rehearing was denied on July 12, 2007 (Pet. App. 73a-74a). The petition for a writ of certiorari was filed on October 10, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of conspiring to commit securities fraud, to commit bank fraud, and to make and cause to be made false statements in filings with the

United States Securities and Exchange Commission (SEC), in violation of 18 U.S.C. 371; 15 counts of securities fraud, in violation of 15 U.S.C. 78j(b); 15 U.S.C. 78ff (2000 & Supp. V 2005); and two counts of bank fraud, in violation of 18 U.S.C. 1344. Timothy J. Rigas was sentenced to 240 months of imprisonment, and John J. Rigas was sentenced to 180 months of imprisonment. The court of appeals affirmed petitioners' convictions on every count except one of the bank fraud counts. The court reversed their convictions on that count and remanded for entry of acquittals and for resentencing. Pet. App. 1a-63a.

1. Adelphia Communications Company (Adelphia) was one of the largest cable television providers in the country. On March 27, 2002, Adelphia publicly disclosed that it had approximately $2.2 billion in liabilities that it had not previously reported on its balance sheet. That day, Adelphia's stock price fell by approximately 25% to $20.39. By May 2002, the price had plummeted to $1.16 per share. In June 2002, Adelphia filed for bankruptcy, wiping out more than $4 billion in shareholder value. The following month, petitioners (and others) were arrested and charged with looting the company and orchestrating a scheme to defraud the company's shareholders, bondholders, and bank lenders. As alleged in the indictment and proved at trial, petitioners' conduct involved fraudulent stock purchases, sham transfers of debt, fraudulent misrepresentations of Adelphia's operating performance, defrauding Adelphia's bank lenders, and looting Adelphia's cash management system. Pet. App. 4a-5a, 9a-19a; Gov't C.A. Br. 6-7.

a. Petitioner John Rigas founded Adelphia, which was a holding company for companies providing cable television service to subscribers in communities

throughout the United States. In 1986, John Rigas took Adelphia public, but the Rigas family retained sufficient stock ownership to maintain control of Adelphia and its Board of Directors. John and his sons occupied four of the seven seats on the Board, and John served as its Chairman. John was also Adelphia's President and Chief Executive Officer, and his son Timothy was its Executive Vice-President and Chief Financial Officer. Pet. App. 5a-6a; Gov't C.A. Br. 12.

After Adelphia went public, the Rigas family continued to own privately a number of other, separate cable companies. Adelphia managed those companies, which were often referred to as the Rigas Managed Entities (RMEs) in Adelphia's public filings. Although those filings disclosed the existence of the management relationships, they did not disclose the amount of the management fees charged to, or paid by, the RMEs, or the fact that cash generated by the RMEs was commingled with cash generated from Adelphia's operations. Petitioners used the business relationship between Adelphia and the RMEs to carry out and to conceal their fraudulent scheme. Pet. App. 6a; Gov't C.A. Br. 10-12.

b. Adelphia's business was "cash flow negative" during the period relevant to this case, which meant that the company did not generate enough cash revenue to pay its costs of operations, capital expenditures, and interest. Between 1999 and 2001, Adelphia spent $1.5 billion to $2 billion per year in capital expenditures to upgrade its cable systems. Between 1998 and 2002, Adelphia also paid over $5 billion in cash, and issued more than 72 million shares of new common stock, to acquire other cable entities in order to lower expenses through operating efficiencies. Adelphia raised new capital from three basic sources in order to offset its operating losses

and fund its rebuilding and acquisition plans: (1) bank loans; (2) public sales of newly issued common and preferred stock; and (3) public sales of notes and convertible debentures. Pet. App. 6a-7a; Gov't C.A. Br. 12-15.

Adelphia's disclosed bank borrowings increased from approximately $827 million in March 1998 to approximately $5.4 billion in September 2001. Generally, for each loan, a group of Adelphia subsidiaries served as the borrowers and pledged their assets as collateral. In 1999, Timothy Rigas proposed a co-borrowing arrangement to the Adelphia Board of Directors. Under the arrangement, a group of Adelphia subsidiaries and one or more RMEs would form a borrowing group for a particular loan agreement, each borrower would be able to borrow under the agreement, and each would be jointly and severally liable for all the borrowings. Timothy led the Board to believe that the arrangement would benefit both Adelphia and the RMEs by lowering borrowing costs and eliminating competition between the public and private companies for bank financing. Under the arrangement, petitioners caused Adelphia to enter into three separate co-borrowing agreements, which provided a combined, total borrowing capacity of approximately $5.5 billion. Pet. App. 7a-8a; Gov't C.A. Br. 15-16.

Between August 1998 and January 2002, Adelphia raised more than $9.3 billion from public sales of securities. Adelphia's sale of common stock and convertible debentures threatened to dilute the Rigases' ownership interest in, and operating control over, the company. To solve that problem, petitioners persuaded Adelphia's Board to sell stock and convertible debentures to the Rigas family whenever it sold similar securities to the public. Petitioners claimed that they needed to maintain

voting control in order to prevent a default under the bank credit agreements and that their securities purchases represented their "public vote of confidence" in Adelphia through the investment of new money. Pet. App. 7a-8a; Gov't C.A. Br. 7, 16-18.

The Rigas family fraudulently purchased $1.6 billion in Adelphia securities in nine separate offerings between 1998 and 2002. The purchase agreements required the Rigas family to pay for the stock purchases at the closing date in "immediately available funds." Adelphia's public filings and press releases suggested that the Rigases paid for the stock in cash. The Rigases, however, lacked sufficient cash to pay for the purchases. In order to complete the transactions, petitioners borrowed funds to pay Adelphia, but then caused Adelphia to use that cash to pay off other Rigas family debts. In later transactions, petitioners did not pay cash at all, but rather caused debt owed by Adelphia under the co-borrowing agreements to be "reclassified," *i.e.*, moved from Adelphia's books to the books of one of the RMEs. The debt "reclassifications" were a sham—the RMEs did not actually assume the debt; it was simply transferred from Adelphia's financial statements to the RMEs' financial statements. But, even if the RMEs had actually assumed Adelphia's debt, Adelphia would still have been worse off than if the Rigases had paid cash for the stock, for two reasons. First, under the co-borrowing agreements, Adelphia was still jointly and severally liable for the debt. Second, if Adelphia had received cash, it could have used the cash to pay down its debts and thus increased its borrowing capacity. Pet. App. 9a-10a; Gov't C.A. Br. 18-28.

c. Petitioners masked other debt owed to Adelphia by the Rigas family, the RMEs, and non-cable entities

owned by the Rigas family (RNCEs) by reporting it on Adelphia's books on a net basis, as a single "related party receivable," rather than itemizing each item owed. This technique concealed the actual amount of cash advanced to the RMEs and RNCEs and the fact that Adelphia had advanced cash to RNCEs that it did not manage. When the net related party receivable reached $200 million, Timothy Rigas and James Brown, Vice President of Finance, discussed moving some of Adelphia's debt, such as debt under co-borrowing agreements, to the books of an RME in exchange for a corresponding reduction in the amount that the RME owed Adelphia. The purpose of this debt reclassification was to avoid disclosing the full net party receivable balance. Adelphia and the RMEs did not enter into formal assumption agreements; the reclassifications were set forth only in general ledger journal entries. Moreover, the journal entries themselves showed that the RMEs did not actually assume debt from Adelphia; each time debt was transferred from Adelphia to an RME, Adelphia booked a payable to the RME in an equal amount. After the initial $200 million reclassification, debt was reclassified on a quarterly basis. Over the course of the conspiracy, more than $2.8 billion of debt was reclassified, including the reclassifications related to the stock purchases. Pet. App. 11a-12a; Gov't C.A. Br. 29-33.

d. Petitioners also manipulated key indices of Adelphia's operating performance in order to satisfy investors, to comply with covenants under Adelphia's bond indentures, and to obtain better interest rates under Adelphia's various bank loans. First, with the knowledge and approval of John Rigas, Timothy Rigas directed or approved quarterly earnings press releases that fraudulently inflated Adelphia's basic subscriber number and

basic subscriber growth rate. Second, during road shows, investor conferences, and shareholder meetings, Timothy fraudulently inflated the percentage of cable systems that Adelphia had upgraded during its rebuilding program. Third, with John Rigas's knowledge, Vice President of Finance Brown artificially inflated Adelphia's Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA), which investors commonly use to evaluate the earnings from the operations of cable companies. Brown did this by: (i) fraudulently inflating management fees owed by a particular RME to Adelphia while recording a corresponding fictitious interest expense that Adelphia owed the RME; and (ii) having Adelphia enter into "wash transactions" with two separate equipment suppliers, Motorola and Scientific Atlanta, in which Adelphia increased the amount it paid for digital converter boxes (reported by Adelphia as capital expenses), and the suppliers agreed to pay Adelphia the amount of the increase for advertising and marketing support (reported by Adelphia as revenue). Pet. App. 12a-17a.

e. The co-borrowing agreements entered into by Adelphia subsidiaries and RMEs required minimum leverage ratios of debt to EBITDA and tied interest rates to the leverage ratios. Although the EBITDA manipulations described above were carried out at the level of the Adelphia parent company, the government maintained at trial, based on Brown's testimony, that the manipulations flowed down to Adelphia subsidiaries and triggered lower interest rates than if EBITDA had been reported accurately. Moreover, when Brown, Timothy Rigas, and Assistant Treasurer Michael Mulcahey saw that the EBITDA of a particular borrowing group was too low to meet a desired leverage ratio, they would ma-

nipulate that EBITDA by artificially moving expenses between companies or recording fictitious income to one company from another. Pet. App. 17a-18a; Gov't C.A. Br. 46-48.

f. Before and during the conspiracy, petitioners took well over $200 million from Adelphia's cash management system (CMS), including more than $3 million to fund production of a film by a Rigas family member and approximately $200 million to pay off Rigas family margin loans. The looting was facilitated by the intentional and systematic commingling of Adelphia's cash with cash from the RMEs and RNCEs. All that was required to authorize a cash transfer for the benefit of the Rigas family was the approval of Brown or a Rigas family member. No promissory notes were ever signed. Nor were the cash transfers reported as compensation or loans, as required by the SEC, or disclosed to investors as related party transactions. In Adelphia's financial statements and annual reports, all related party transactions with the Rigas family and the RNCEs were lumped together and "netted out" against transactions with the RMEs, in order to obscure the amounts owed by the Rigas family to Adelphia. Including the reclassified co-borrowing debt, the net receivables owed to Adelphia from Rigas family entities totaled approximately $3.2 billion. Pet. App. 18a-20a; Gov't C.A. Br. 50-53, 58-62.

2. On July 30, 2003, a grand jury sitting in the Southern District of New York returned a superseding indictment charging petitioners (and others) with conspiring to commit securities, wire, and bank fraud, to make and cause to be made false statements in SEC filings, and to falsify business records, in violation of 18 U.S.C. 371 (Count One); securities fraud, in violation of

15 U.S.C. 78j(b); 15 U.S.C. 78ff (2000 & Supp. V 2005) (Counts Two through 16); wire fraud, in violation of 18 U.S.C. 1343 (Supp. V 2005); 18 U.S.C. 1346 (Counts 17 through 21); and bank fraud, in violation of 18 U.S.C. 1344 (Counts 22 and 23). Pet. App. 79a-174a.

3. On July 8, 2004, following a lengthy trial, a jury found petitioners guilty of all the substantive securities and bank fraud charges and of conspiring to commit securities and bank fraud and to make and cause to be made false statements in SEC filings. The jury acquitted petitioners of conspiring to commit wire fraud and of the substantive wire fraud charges. Pet. App. 3a, 20a; Gov't C.A. Br. 2.[1]

On June 20, 2005, the district court sentenced John Rigas to 180 months of imprisonment, to be followed by six months of supervised release, and sentenced Timothy Rigas to 240 months of imprisonment, to be followed by two years of supervised release. The court did not impose a fine or restitution on either petitioner because the Rigas family had reached a settlement with the government under which the family agreed to forfeit more than $1 billion in assets. Gov't C.A. Br. 3 & n. *.

4. The court of appeals affirmed petitioners' convictions on all counts except one bank fraud count (Count 23). The court reversed the convictions on that count and remanded the case for entry of acquittals on that count and for resentencing. Pet. App. 1a-63a.

a. Petitioners' primary claim on appeal was that they could not be convicted of securities fraud or conspiracy to commit securities fraud unless the government proved, through the testimony of an accounting expert,

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[1] The jury deadlocked on whether petitioners conspired to falsify the books and records of a public corporation. Pet. App. 3a n.1.

that they had violated Generally Accepted Accounting Principles (GAAP). Pet. C.A. Br. 40-44, 49-67. The court of appeals rejected that argument. Pet. App. 21a-26a. Citing *United States* v. *Simon*, 425 F.2d 796, 805-806 (2d Cir.) (Friendly, J.), cert. denied, 397 U.S. 1006 (1969), the court noted "the long-held view in [the Second] Circuit that GAAP neither establishes nor shields guilt in a securities fraud case." Pet. App. 22a; see *id.* at 22a-23a (observing that *Simon* had been "unequivocally reaffirmed" by *United States* v. *Ebbers*, 458 F.3d 110 (2d Cir. 2006), cert. denied, 127 S. Ct. 1483 (2007)). The court explained that "[m]aking GAAP compliance determinative of securities fraud charges would require jurors to 'accept the accountants' evaluation whether a given fact was material to overall fair presentation.'" *Id.* at 22a (quoting *Simon*, 425 F.2d at 806). Thus, the court explained, although "compliance with GAAP is relevant * * * as evidence of whether a defendant acted in good faith," the government need not prove that a defendant failed to comply with GAAP in order to establish securities fraud. *Ibid.*

The court rejected petitioners' contention that the rule in *Simon* is inapplicable here because it applies only when no specific provision of GAAP addresses the accounting practice at issue. Pet. App. 23a-25a. Specifically, petitioners argued that Financial Accounting Statement Number 5 (FAS 5), which deals with loss contingencies, addresses how Adelphia should have accounted for and disclosed the debt under the co-borrowing agreements. *Id.* at 21a; Pet. C.A. Br. 54-56. Petitioners contended that, because FAS 5 applied to the co-borrowed debt, the government could not establish that petitioners committed securities fraud unless the government proved non-compliance with FAS 5 or, at a min-

imum, offered expert testimony on the subject. *Ibid.*; Pet. C.A. Reply Br. 11-17 & n.14. The court rejected that argument, finding that noncompliance with GAAP was "not essential to the securities fraud alleged" in this case. Pet. App. 23a. The court explained that, even if petitioners had complied with GAAP, the jury could have found that they had intentionally misled investors based on the evidence that petitioners had reclassified co-borrowed debt—for which Adelphia was jointly and severally liable—rather than pay for securities in "immediately available funds," and based on the testimony that the specific purpose of the debt reclassifications was to mislead investors about the amount of money that the Rigas family and RMEs owed Adelphia. *Id.* at 23a-24a. "As a result," the court explained, "the jury could find that investors were misled into believing that Adelphia had been infused with more cash, when, in reality, debt for which Adelphia remained jointly and severally liable was moved onto the RMEs' books." *Id.* at 24a-25a. Whether GAAP authorized the debt reclassifications thus "was not the issue." *Id.* at 25a.

The court of appeals also rejected petitioners' related claim that the district court should have required the prosecution to call an expert witness to testify regarding FAS 5. Pet. App. 25a. The court concluded that the claim was foreclosed by *Ebbers*, which held that "[t]he government is not required in addition to prevail in a battle of expert witnesses over the application of individual GAAP rules." *Ibid.* (quoting *Ebbers*, 458 F.3d at 125-126). The court observed that, although the district court had "opined that an expert might be helpful," the prosecution believed it could explain the fraud through the testimony of other witnesses. *Ibid.* Therefore, the court of appeals held, the district court "did not err by

not requiring the prosecution to call accounting experts." *Ibid.*

In rejecting petitioners' arguments about GAAP, the court of appeals distinguished *United States* v. *Lake*, 472 F.3d 1247 (10th Cir. 2007), on which petitioners relied. Pet. App. 25a-26a. The court explained that the defendants in *Lake* had been charged with wire fraud premised on the filing of allegedly false reports with the SEC. The government argued that the reports were false because they failed to disclose the defendants' personal use of corporate aircraft. The Tenth Circuit reversed the convictions because the government did not show that the SEC required the disclosure of the aircraft use, and thus there was no evidence from which the jury could infer that the reports were false. The court of appeals explained that "*Lake* is inapposite here" because, although SEC rules on what had to be included in the reports in *Lake* necessarily determined whether the reports were false, "GAAP rules do not govern whether Adelphia's disclosures regarding the Co-Borrowing Agreements were false and fraudulent, and a violation of GAAP is not an element of the offenses charged." *Id.* at 26a.

b. Petitioners also attacked their bank fraud convictions. Pet. C.A. Br. 81-101. Those convictions were based on allegations that petitioners had misrepresented the EBITDA of Adelphia and its subsidiaries in order to obtain lower interest rates by artificially depressing the leverage ratio of borrowing groups involved in two co-borrowing agreements. Pet. App. 17a-18a, 171a-172a. As relevant here, petitioners claimed that the evidence was not sufficient to prove that the misrepresentations made to the banks were material. Pet. C.A. Br. 94-101. The court of appeals held that the evidence

was sufficient to support the convictions on Count 22, which concerned the Century (CCH) co-borrowing agreement, but that the evidence was insufficient to support the convictions on Count 23, which concerned the Olympus (OCH) co-borrowing agreement. Pet. App. 44a-57a.

The court first explained that "[petitioners'] misrepresentations were material only if they tended to affect interest rates"—that is, "only if the jury could have concluded that the fraudulent leverage ratio resulted in the co-borrowers being in a different interest category than they would have been had the accurate leverage ratio been reported." Pet. App. 53a, 55a. Applying that standard to the evidence on Count 22, the court noted that the CCH agreement provided that a higher interest rate would be charged on term loans if the leverage ratio was higher than 5.0. *Id.* at 56a. The court further noted that defendant Mulcahey "testified that he reduced management fees from the CCH Co-Borrowing Group by $6 million to 'put the borrowing group in a better position as far as the [interest] on the agreement.'" *Ibid.* (brackets in original). And that testimony was confirmed by handwritten notes dated October 1, 2001, which stated that the actual leverage ratio for the CCH borrowing group was 5.01, even though the ratio reported to the banks was 4.98. *Ibid.* The court therefore concluded that the evidence was sufficient to support the convictions on Count 22. *Ibid.* With respect to Count 23, the court found that "[t]he evidence supporting the leverage ratio/interest rate manipulation scheme appear[ed] to boil down to Brown's conclusory opinion that bank debt compliance documents were manipulated in 2000 and 2001." *Id.* at 57a. The court held that Brown's testimony was insufficient to prove that petitioners made material mis-

representations to the banks regarding the OCH co-borrowing agreement, and the evidence was therefore insufficient to support the convictions on Count 23. *Ibid.*

5. Petitioners filed a petition for panel rehearing, contending that their convictions on Count 22 should be reversed in light of the court's reversal on Count 23. Pet. for Reh'g 1. The court of appeals denied the petition. Pet. App. 73a-74a.

ARGUMENT

1. Petitioners' primary contentions (Pet. 20-26) are that the government was required to prove a violation of GAAP in order to convict them of securities fraud and that the court of appeals' decision to the contrary conflicts with *United States* v. *Lake*, 472 F.3d 1247 (10th Cir. 2007). The court of appeals correctly rejected those contentions, and they do not warrant further review.

a. The court of appeals correctly concluded that the government was not required to prove that petitioners violated GAAP in order to establish that they committed securities fraud. Pet. App. 21a-26a. As the court of appeals explained, a violation of GAAP is not generally an element of a securities fraud offense. *Id.* at 22a-23a, 26a. "[E]ven where improper accounting is alleged, the statute requires proof only of intentionally misleading statements that are material." *United States* v. *Ebbers*, 458 F.3d 110, 125 (2d Cir. 2006) (citing 15 U.S.C. 78ff (2000 & Supp. V 2005)), cert. denied, 127 S. Ct. 1483 (2007). GAAP is a set of accounting principles, not laws, see *id.* at 125 n.2, and statements may be materially misleading even when they comply with particular requirements of GAAP. Indeed, "GAAP itself recognizes that technical compliance with particular GAAP rules may lead to misleading financial statements, and imposes an

overall requirement that the statements as a whole accurately reflect the financial status of the company." *Id.* at 126.

As the court of appeals noted (Pet. App. 23a), good faith compliance with GAAP may be relevant to show that a particular defendant lacked the requisite intent to defraud. See *Ebbers*, 458 F.3d at 125; *United States* v. *Simon*, 425 F.2d 796, 806 (2d Cir.), cert. denied, 397 U.S. 1006 (1969). But compliance with GAAP does not shield a defendant from criminal liability. Such a rule would allow fraudsters to hide behind technical compliance with particular GAAP rules in order to avoid criminal liability for fraudulent and misleading conduct. See *Ebbers*, 458 F.3d at 126. See also *United States* v. *Sarno*, 73 F.3d 1470, 1482 n.6 (9th Cir. 1995) (holding, in false statements prosecution under 18 U.S.C. 1014 (1994), that "[a]dherence to GAAP would obviously qualify as weighty exculpatory evidence; it does not, however, necessarily shield one from criminal liability"), cert. denied, 518 U.S. 1020, and 519 U.S. 859 (1996).

Furthermore, as the court of appeals explained, GAAP's "requirements [we]re not essential to the securities fraud alleged" in this particular case. Pet. App. 23a. The gravamen of the securities fraud alleged in the indictment was not that petitioners had failed to comply with GAAP, but that they had engaged in a systematic course of conduct designed to: (1) give the false appearance that Adelphia's operating performance was consistently in line with investors' expectations; (2) hide Adelphia's growing debt burden by making it appear as if "Adelphia was systematically deleveraging through, among other means, sales of equity securities to the Rigas family;" and (3) obscure the fact that petitioners were using Adelphia funds and other assets for their personal

benefit and that of other Rigas family members. See *id.* at 102a-103a. That course of conduct involved defrauding investors by making false and misleading statements regarding: Adelphia's "off-balance sheet" debt; the extent and circumstances of reductions in Adelphia's debt through sales of securities to the Rigas family and the public; Adelphia's operating performance; Adelphia's compliance with certain debt covenants under the co-borrowing agreements and Adelphia's bond indentures; and the unauthorized and undisclosed use and conversion of Adelphia's funds and assets by the Rigas family. See *id.* at 103a-104a; see also Gov't C.A. Br. 67-68.

Contrary to petitioners' suggestion (Pet. 23-25), the fraud allegations based on Adelphia's accounting and disclosures about the co-borrowing did not depend on whether the accounting and disclosures complied with GAAP. The government's proof established that the accounting and disclosures were false and misleading not because they failed to comply with GAAP, but because the debt reclassifications lacked any basis in economic reality and were designed to mislead investors. As the court of appeals noted, "[t]he jury heard testimony that the debt reclassifications were specifically designed to mislead investors about the amount of money the Rigas family and their other companies owed Adelphia." Pet. App. 23a-24a. The evidence also showed that the RMEs did not actually "assume" any debt from Adelphia. No paperwork, agreements, or documents supported the purported assumptions of debt; Adelphia recorded a corresponding payable to the RMEs in the amount of the purported "assumption" of debt; and Adelphia remained jointly and severally liable to the banks for the reclassified debt. See Gov't C.A. Br. 68-69; pp. 4-5, *supra*. Moreover, Adelphia's financial statements falsely sug-

gested that Adelphia had received "proceeds" from the Rigases' securities purchases and used those proceeds to pay down Adelphia's debts. See Gov't C.A. Br. 70; Pet. App. 24a. "As a result, the jury could [have found] that investors were misled into believing that Adelphia had been infused with more cash, when, in reality," all that had occurred was that "debt for which Adelphia remained jointly and severally liable was moved onto the RMEs' books." *Id.* at 24a-25a. A showing that the statements were in compliance with GAAP would not cure those misleading impressions. Thus, as the court of appeals concluded, whether Adelphia's disclosures complied with GAAP had little or no bearing on the case. *Id.* at 25a.

b. Contrary to petitioners' contention (Pet. 20-21, 25-26), the court of appeals' decision does not conflict with the Tenth Circuit's decision in *Lake*. The defendants in *Lake* were convicted of wire fraud based on the filing of allegedly false reports with the SEC. 472 F.3d at 1253-1255. The "government's sole challenge to the reports" was that they "failed to disclose the defendants' personal use of corporate aircraft." *Id.* at 1258. The Tenth Circuit reversed the convictions because the government did not show that the SEC required that the reports disclose the aircraft use, and thus there was no evidence from which the jury could infer that the reports were false. *Id.* at 1258-1263.

As the court below explained, that holding in no way conflicts with the holding here that the government was not required to prove a GAAP violation. Pet. App. 25a-26a. The charges in *Lake* turned on whether SEC-required reports were false, and the government claimed that the reports were false only because they failed to disclose the defendants' personal aircraft use. There-

fore, in order to show that the reports were false, the government had to prove that the SEC required the reports to include the disclosure. Here, by contrast, the government did not argue at trial that Adelphia's financial statements were false and misleading because FAS 5 or other GAAP provisions required disclosure of the full amount of Adelphia's liability under the co-borrowing arrangements, including debts assumed by RMEs. Instead, the government argued that the purported assumptions of debt were a sham and that Adelphia's financial statements falsely suggested that Adelphia had received actual "proceeds" from the Rigases' securities purchases. Therefore, as the court of appeals explained, "GAAP rules [did] not govern whether Aldephia's disclosures regarding the Co-Borrowing Agreements were false and fraudulent," and the government was not required to prove a failure to comply with FAS 5 or any other aspect of GAAP. *Id.* at 26a.

c. Petitioners also incorrectly contend (Pet. 19-20, 32-34) that the court of appeals erred because, according to them, it ruled that their convictions could be sustained based on frauds other than the false and misleading disclosures about the co-borrowing agreements. Petitioners argue that this purported ruling conflicts with *Yates* v. *United States*, 354 U.S. 298 (1957), which held that a general verdict that might have rested on any one of several bases must be set aside if one of those bases was legally invalid. *Id.* at 311-312. That argument is mistaken. The court of appeals did not hold that the co-borrowing fraud theory was legally invalid. Rather, the court held that the co-borrowing theory was valid because it did not depend on a showing that petitioners failed to comply with GAAP. See Pet. App. 21a-26a. Because the court of appeals correctly held that the co-bor-

rowing theory was not legally invalid, *Yates* is inapposite.

Moreover, to the extent that petitioners contend that the co-borrowing theory was invalid because the government failed to prove non-compliance with GAAP, *Yates* is inapposite for another reason as well. In *Griffin* v. *United States*, 502 U.S. 46 (1991), this Court held that, notwithstanding *Yates*, a general verdict resting on several alternative bases need not be set aside if one of those bases was merely insufficiently supported in the record, as long as at least one of the other bases was sufficiently supported. *Id.* at 56-57. As we have shown, the securities fraud allegations were supported by ample evidence at trial separate and apart from any possible violation of GAAP. See pp. 15-17, *supra*. Although petitioners now argue (Pet. 33-34) that the government's failure to establish a GAAP violation was somehow a legal error, that argument contradicts their position in the district court, where they characterized the GAAP issue as a failure of proof. See Gov't C.A. Br. 64 n.* (explaining that defense counsel argued that, because it was the government's "burden to prove that [GAAP] * * * required disclosures of the amount of co-borrowing," the government had "simply not proved any of the allegations of wrongdoing with regard to the co-borrowing") (quoting Tr. 8743-8744). A simple failure of proof would implicate *Griffin*, not *Yates*. Petitioners' reliance on *Yates* is therefore misplaced, and further review is not warranted.

2. a. Nor is review warranted of petitioners' related contention (Pet. 26-32) that the government was required to call an expert accounting witness to support its allegations of securities fraud. That contention rests on the erroneous premise that the government was re-

quired to prove a violation of GAAP in order to secure a conviction on the securities fraud counts. See Pet. 27 (arguing that "courts have routinely required expert testimony to demonstrate the existence of a GAAP violation or irregularity"). As discussed above, the court of appeals correctly held that there is no such requirement. See pp. 14-15, *supra*. Accordingly, petitioner's derivative contention that the government was required to call an expert accounting witness likewise lacks merit. See Pet. App. 23a ("The government was not required to present expert testimony about GAAP's requirements because these requirements are not essential to the securities fraud alleged here.").

For that reason, the civil cases cited by petitioner (Pet. 27-28) present no conflict with the court of appeals' decision here. In all of those cases, liability depended on proof of a violation of GAAP or Generally Accepted Auditing Standards (GAAS). And petitioners cite no criminal securities fraud case in which a court has required the government to call an expert accounting witness.

Petitioners do cite three criminal cases outside the securities context in which the courts mentioned the government's failure to call an expert witness in the course of reversing criminal convictions. See Pet. 31 & n.24. But those cases, two of which are over 40 years old, involved technical issues that a jury was likely to need expert testimony to resolve. And none of the cases imposed a categorical requirement that expert testimony was required in every case that raised the issue. Instead, they held that the government had been unable, under the facts of the particular cases, to meet its bur-

den of proof in the absence of expert or similar testimony.[2]

Here, in contrast, the court of appeals correctly concluded that the government was able to explain petitioners' fraudulent scheme to the jury through the testimony of non-expert witnesses, such as Adelphia's former Vice President of Finance (James Brown) and an accountant/manager in Adelphia's treasury department (James Helms). See Pet. App. 25a. There was no need for an expert witness to testify about an accounting issue that lay at the periphery of petitioners' fraudulent scheme.

b. Review of petitioners' expert witness claim is unwarranted for the additional reason that they did not raise the claim in the district court. Although the trial judge suggested that an expert witness might be helpful to the government's case, see Pet. App. 25a, the court

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[2] *United States* v. *Klaw*, 350 F.2d 155 (2d Cir. 1965), involved the question whether allegedly obscene material "appeal[ed] to the prurient interest." *Id.* at 167. The court held that there was no evidence that material had prurient appeal. In passing, the court observed that "[i]t may be difficult to find expert and other witnesses properly qualified to inform the jury about what does or does not appeal to the prurient interest," but "it would not seem impossible." *Ibid.* The court did not, however, hold that expert testimony was required. *Cook* v. *United States*, 362 F.2d 548 (9th Cir. 1966), involved the question whether drugs possessed by the defendants were "in fact narcotic drugs." *Id.* at 549. The court did not hold that expert testimony was required; rather, the court in the course of holding that the government "made no attempt to prove the narcotic character of the drugs," merely noted that "no qualified witness" was "called to establish or testify" that the drugs were narcotic. *Ibid.* *United States* v. *Katz*, 178 F.3d 368 (5th Cir. 1999), involved the question whether post-puberty models in an allegedly pornographic film were over the age of 18. The court held that whether expert testimony was required "must be determined on a case by case basis." *Id.* at 373.

did not rule that expert testimony was required, and petitioners never asked the court to do so. Consequently, as the government argued below, see Gov't C.A. Br. 65 & n.*, petitioners' claim is subject to plain-error review. See Fed. R. Crim. P. 52(b). Petitioners therefore would be entitled to relief only if they could show that failure to call an accounting witness was plain error that affected their substantial rights, and only if the error seriously affected the fairness, integrity, or public reputation of the sentencing proceedings. *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Petitioners' inability to cite any criminal securities fraud cases requiring the government to present expert accounting testimony precludes them from establishing that any error was "plain." See *United States* v. *Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003) ("[W]here the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it."). Moreover, because compliance with GAAP was not determinative of the securities fraud proved in this case, petitioners also cannot satisfy the other requirements for relief under the plain error standard.

3. Petitioners also contend (Pet. 34-37) that the reversal of their bank fraud convictions on Count 23 requires reversal of their bank fraud convictions on Count 22. That contention lacks merit.

a. As a threshold matter, petitioners concede (Pet. 34) that their bank fraud claim is not, standing alone, sufficiently important to warrant a grant of certiorari. They ask this Court to review their claim only if the Court reviews the other claims presented in their petition, so that the Court would thereby "take the entire

case." Pet. 34.[3] As shown above, review of petitioners' other claims is not warranted. Accordingly, review of their bank fraud claim is not warranted as well.

b. In any event, petitioners' bank fraud claim lacks merit. The theory of bank fraud presented by the government at trial was that petitioners and their co-defendants had filed loan compliance certifications with Adelphia's banks that lied about the true leverage ratio of the co-borrowing group by inflating the EBITDA that was used to calculate the ratio, and by taking out expenses, such as management fees, from EBITDA. See Pet. App. 50a (quoting government's summation to the jury). Assessing the sufficiency of the evidence on the bank fraud counts, the court of appeals held that "[petitioners'] misrepresentations were material only if they tended to affect interest rates"—that is, "only if the jury could have concluded that the fraudulent leverage ratio resulted in the co-borrowers being in a different interest category than they would have been had the accurate leverage ratio been reported." *Id.* at 55a. The court found the evidence of materiality sufficient on Count 22 primarily because co-defendant Mulcahey testified that he had reduced management fees from the CCH co-borrowing group by $6 million in order to reduce the applicable interest rate on the loan, and because documen-

[3] In fact, the Court would not be "tak[ing] the entire case" even if it granted review on all of the questions presented by the petition. Petitioners' conspiracy convictions would still be valid even if they prevailed on all the issues they ask this Court to review. The jury returned a special verdict on the conspiracy charges and expressly found that petitioners not only conspired to commit securities and bank fraud but also conspired to make false statements in SEC filings. The conviction for conspiracy to make false filings would not be undermined by a decision in favor of petitioners on any of the claims they have presented to this Court.

tary evidence showed that the actual leverage ratio was 5.01, when the ratio reported to the banks was 4.98—slightly below the 5.0 threshold that would have triggered a higher interest rate on the term loan component of the CCH co-borrowing agreement. *Id.* at 56a.

Petitioners contend (Pet. 34-36) that their convictions on Count 22 must nonetheless be reversed because the court of appeals rejected an alternative theory on which the materiality of the misrepresentation proven in Count 22 could have been based—that the EBITDA manipulations involving Adelphia's sham marketing agreements with Motorola and Scientific Atlantic "trickled down" to the Adelphia subsidiaries that were in the borrowing group, thereby affecting the leverage ratios. According to petitioners, "it is impossible to tell whether the jury verdict rested solely on the infirm theory," Pet. 36, and reversal is therefore required under *Yates*.

Petitioners are mistaken for two reasons. First, the court of appeals did not reject the "trickle down" theory on Count 22. On the contrary, although the court focused on the management-fee evidence, it stated in a footnote "that the evidence presented by the government at trial as to the aggregate *effect of the EBITDA trickle-down* and the direct management expense schemes was sufficient to allow the jury to convict Defendants on Count Twenty-Two." Pet. App. 56a n.40 (emphasis added). Second, even on Count 23, the court did not reject the trickle-down theory as legally infirm. Rather, the court held that the evidence supporting the theory was insufficient. *Id.* at 56a-57a. Thus, even if one assumes *arguendo* that the court implicitly rejected the trickle-down theory on Count 22, it would have done so on the basis of insufficient evidence. Consequently, *Griffin*, rather than *Yates*, would apply, and there would

be no basis to reverse petitioners' convictions. See pp. 18-19, *supra*. Review of petitioners' bank fraud claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 07-494

IN THE

Supreme Court of the United States

TIMOTHY J. RIGAS AND JOHN J. RIGAS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. The Issue Raised in the Petition is Squarely Presented in This Case

The government's Opposition boldly asserts that the co-borrowing fraud allegations in this case "did not depend on whether the accounting and disclosure complied with GAAP." *See* Cert. Opp. at 16.[1] One reads the Government's entire Opposition, however, without ever learning what co-borrowing fraud was charged in the Indictment, or what FAS-5 says. Not surprisingly then, one does not learn from the Opposition whether a written rule of GAAP governs any issue in this case.

The important fraud alleged in the Indictment deals exclusively with co-borrowings. It charges (i) that the Rigases misrepresented Adelphia's liabilities by failing to carry the RFEs' share of the co-borrowing debt as a liability on Adelphia's balance sheet; and (ii) that they failed properly to disclose the RFEs' share of this debt in financial statement footnotes, "pursuant to GAAP." *See* Pet. at 14; Indictment ¶¶ 64-72 (Pet. App. at 104a-107a).

These accounting issues are governed by FAS-5. Adelphia was contingently liable for the RFEs' share of the co-borrowings, and FAS-5 provides that contingent debt need be carried as a liability by a company only if it is "probable" that the company will have to pay it. Pet. at 23-24. It also provides

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[1] *See* Brief for the United States in Opposition ("Opposition" or "Cert. Opp.").

the rules for when and how contingent debt should be disclosed in footnotes to financial statements. *Id.*

The SEC recently found FAS-5 to be dispositive in a parallel proceeding brought against the DeLoitte partner who approved the manner in which Adelphia accounted for and disclosed the co-borrowed debt. *See In re Dearlove, CPA*, No. 3-12064, Securities Act Rel. No. 57244; Accounting And Auditing Enforcement Rel. No. 2779, 2008 SEC LEXIS 223 (Jan. 31, 2008).

The Commission stated "when an issuer deems itself to be merely contingently liable for a debt, Statement of Accounting Standards No. 5 ("FAS 5") provides the appropriate accounting and reporting treatment for that liability." *Id.* at *38. The Commission then applied FAS 5 and concluded (1) that the allegation that Adelphia had violated GAAP by treating the Rigases' entire co-borrowed debt "as a contingent debt rather than a primary liability on its financial statements" and the allegation that "Adelphia wrongly determined that its chances of having to repay that debt was only remote under FAS 5," were both unproven; but (2) that the footnote disclosure about the co-borrowed debt was inadequate. *Id.* at *48, **58-59.

Of course, neither conclusion is binding in this criminal case which must be decided by a jury on the record developed at trial. However, it is significant that on both issues, the SEC treated FAS-5 as providing the governing standard.

This co-borrowing fraud was by far the most important in the case. It involved an alleged understatement of liabilities in Adelphia's 10K for the year 2000 of $1.5 billion. Indictment ¶ 70 (Pet. App. at 106a). The government began its case with co-borrowing fraud evidence, Tr. 652-53; 813-15; it blamed Adelphia's bankruptcy on it, Tr. 11197-98; it sought and received a special jury instruction based on it, Tr. 11399; and it argued at sentencing that Adelphia's shareholders lost $4 billion because of it. All of this is to say that the Rigas' are serving lengthy prison sentences (20 years for Tim Rigas, and 15 years for John Rigas, who is 83 years old) for an alleged fraud involving an accounting issue governed by a GAAP rule of which the jury never learned.

In short, the government's Opposition essentially ignores the fundamental and nationally significant issue raised by this Petition.

2. The Proposition That FASB's Written Rules are Relevant Only to the Issue of Criminal Intent is Profoundly Wrong

In its Opposition, the Government endorses the decision of the court of appeals that "GAAP rules do not govern" and are relevant only as evidence of good faith. That position is profoundly wrong.

When it comes to the preparation of balance sheets and public financial statements, the FASB makes the rules. It does so pursuant to explicit power that Congress delegated to the SEC and that the SEC delegated to the FASB. Pet. at 21-23. The

Rigases were entitled to have their conduct, in accounting for and disclosing the co-borrowed debt, judged against those rules. They may properly be convicted only if the Government proved and the jury found that they failed to follow those rules. That did not happen here: the Government never called an accounting expert to inform the jury what the rules were, and the jury never decided whether the rules were followed or violated.

The idea that adhering to the established rules is relevant only to the issue of criminal intent is anathema to our criminal law. It is an invitation to lawlessness -- to subjective and inconsistent application of the laws by prosecutors and jurors. Moreover, criminal intent is the intent to do something the law forbids. The jury could not know whether the Rigases acted with criminal intent without knowing what the applicable rules require.

Judge Friendly, speaking for the court of appeals in *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), had it right. In that case, there were no GAAP rules that addressed the disclosure issue at hand. An accountant sought to defend his conduct in certifying a misleading financial statement by claiming generally that he had not violated GAAP. Judge Friendly rejected that defense saying that compliance with GAAP was not determinative. He limited his opinion, however, to situations in which there are no "specific rules or prohibitions" on point.

In the years immediately following *Simon*, the FASB was created, and it has promulgated a comprehensive series of rules that govern the

preparation of public financial statements. Pet. at 21-23. The decision below ignored the qualifying language in *Simon*. In doing so, it permits criminal prosecutions of corporate executives who follow the rules, so long as prosecutors can persuade a jury that the executives acted with wrongful intent.

That is a dangerous precedent from the court of appeals that decides the lion's share of criminal securities fraud cases in this country.

3. The Cash Management System

The Government devotes part of its Opposition to the Adelphia Cash Management System ("CMS"). Under the CMS, revenues from Adelphia and its subsidiaries were commingled with revenues from the Rigas family owned cable entities which were managed by Adelphia, in return for a management fee. The Government suggests that this commingling gave rise to or misappropriation of funds by the Rigases.

The basic facts are these: First, there was nothing improper about this commingling arrangement, as the government conceded below. Tr. 9062-63. Second, every dollar going into and out of the CMS was meticulously and accurately accounted for. *E.g.*, Tr. 4499-4512, 4614. Running balances were kept for each RFE and each Rigas family member. Third, the CMS was subject to annual audit by DeLoitte, Tr. 4512, 9090-91, resulting in clean audit opinions. Tr. 4512-13; 4821-22; 4945-47; 9769-72. This may explain why the jury acquitted the Rigases on all wire fraud counts -- the

only counts charging them with defrauding *Adelphia* out of money.

In short, to the extent that the government discusses the CMS to suggest to the Court that it, and not the co-borrowing fraud, was the heart of this case, that suggestion is wholly unfounded. The Rigas case centered on allegations of co-borrowing fraud, and the jury *never* was apprised of the controlling GAAP standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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